

GUARDIANSHIP IN SOUTH ASIA WITH SPECIAL
REFERENCE TO ALIENATION AND LIMITATION

BY

MUHAMMAD BADARUDDIN

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A C K N O W L E D G E M E N T S

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A B S T R A C T

This thesis deals with the alienations of minors' properties by their guardians in South Asia and the law of limitation as it involves the setting aside improper alienations. In dealing with these two aspects of guardianship relating to property of minors a little effort is made to comment on the security of a minor's life if the guardianship of his person and of property are united in the same individual in the Subcontinent, and on the conservative attitude to deny custody of minor children to a guilty parent in Sri Lanka. For a convenient discussion of the subject the work is divided into six chapters devoting the first five to the relevant law of guardianship as it obtains in the Subcontinent and the last one to that of Sri Lanka.

The first chapter deals, in brief, with the major legal systems from which the modern law of guardianship in the Subcontinent has developed. In the course of treatment it is attempted to show, along with the general discussion of the powers of guardians to deal with minors' properties, how the early British Regulations and Acts maintained the sastric and Common law principle of separating the guardianship of person and of property.

Chapter 2 portrays the transformation of the powers of Hindu natural guardians from the sastric via Anglo-Hindu

to the modern law. It has been shown in this connection how some of the sastric principles of Hindu law, e.g., for the payment of ancestral debts, have yielded to the influence of English equity rules.

Chapter 3 is devoted to the exposition of de facto guardianship in Hindu law, the development of the powers of a de facto guardian equal to those of a natural guardian, and how it served the society well for over a century. Section 11 of the Hindu Minority and Guardianship Act, 1956, has been specially examined for its alleged abolition of de facto guardianship, and its amendment is suggested in this chapter. The principles of Mir Sarwarjan's case regarding the specific enforcement of a guardian's contract have been investigated and the powers of Hindu testamentary guardians are discussed in this chapter.

Chapter 4 deals with the powers of a Muslim natural guardian in respect of minors' property; and suggestions are made in this chapter to place Muslim mothers in the position of natural guardians with full powers to deal with their minor children's properties, and to introduce the institution of de facto guardianship in Muslim law.

Chapter 5 deals with the law of limitation especially with regard to setting aside an improper alienation of a Hindu de facto guardian. It has been shown how the judges were misled by the principles of Muslim cases to develop a different set of limitation rules applicable in cases of

improper alienations by de facto guardians, while their general powers and the effects of their proper alienations are similar in all respects with those of natural guardians. Uniformity of law in this regard is suggested.

In the last chapter is discussed the law of guardianship in Sri Lanka. In the earlier part of the chapter the personal laws of different communities and the Roman-Dutch law are discussed in so far as they are concerned with the law of guardianship of person, and the growing influence of South African law has been shown. The little case-law that has developed in regard to property guardianship has been dealt with in the light of statutory law in the latter part of the chapter. The law of prescription which is applicable to an improper alienation of a minor's property is discussed in this chapter.

In the conclusion I have submitted my suggestions.

L I S T O F A B B R E V I A T I O N S

AC	Appeal Cases
AD	Appellate Division
Ad & El	Adolphus and Ellis
AIR	All India Reporter
All	Allahabad
All ER	All England Law Reports
All LJ	Allahabad Law Journal
An WR	Andhra Weekly Reporter
AP	Andhra Pradesh
Atk	Atkyns
B & Ad	Barnewall and Adolphus
Baud.	Baudhayana-dharma-sutra
Beav	Beavan
Beng	Bengal
Bing	Bingham
BLR	Bengal Law Reports
Bom	Bombay
Bom HC Rep	Bombay High Court Reports
Bom LR	Bom Law Reporter
Bri.	Brihaspati-smṛti
CA	Court of Appeal
Cal	Calcutta
Carth	Carthew
CB	Common Bench Reports
Ch	Chancery Appeals, Law Reports

Ch D	Law Reports, Chancery Division
C1 & F	Clark and Finelly
CLJ	Calcutta Law Journal
CLR	Calcutta Law Reports
CLW	Ceylon Law Weekly
Co Rep	Coke's Reports
CR	Civil Rulings
Cutt	Cuttack
CWN	Calcutta Weekly Notes
Dac	Dacca
De G & Sm	De Gex and Smale
De GM & G	De Gex Macnaghten and Gordon
Dick	Dickens
E & B	Ellis and Blackburn
EHR	English Historical Review
Eq Cas	Equity Cases
ER	English Reports
Esp	Espinasse
FB	Full Bench
FC	Federal Court
Gau	Gauhati
Gaut.	Gautama-sutra
GWA	Guardians and Wards Act, 1890
HL	House of Lords
HLC	House of Lords Cases
HMGA	Hindu Minority and Guardianship Act, 1956
Hyd	Hyderabad
IA	Indian Appeals

IC	Indian Cases
ICLQ	International and Comparative Law Quarterly
ID	Indian Decisions
ILR	Indian Law Reports [In this thesis references like (1917) 40 Mad 243, (1946) Mad 648 indicate Indian Law Reports Madras series].
IECL	International Encyclopedia of Comparative Law
IR	Irish Reports
Jac & W	Jacob and Walker
JAOS	Journal of the American Oriental Society
JILI	Journal of the Indian Law Institute
Kar	Karachi
Katya.	Katyayana-smṛti
Kaut.	Kautilya Arthashastra
KB	King's Bench
Ker	Kerala
K & J	Kay and Johnson
KLT	Kerala Law Times
Lah	Lahore
LJ	Law Journal
LQR	Law Quarterly Review
LT	Law Times
Luck	Lucknow
M & G	Manning and Granger
M & S	Mande and Selwyn
M & W	Meeson and Welsby
Macq HL	Macqueen's House of Lords Reports

Mad	Madras
Mad HC Rep	Madras High Court Reports
Mah LJ	Maharashtra Law Journal
MIA	Moore's Indian Appeals
MLJ	Madras Law Journal
MP	Madhya Pradesh
My & Cr	Mylne and Craig
My & K	Mylne and Keen
Mys	Mysore
Mys LJ	Mysore Law Journal
MWN	Madras Weekly Notes
Nag	Nagpur
Nag LJ	Nagpur Law Journal
Nag LR	Nagpur Law Reports
Nar.	Narada-smṛti
NE	New Edition
NS	New Series
NUC	Notes of Unreported Cases
NLR	New Law Reports (Sri Lanka)
N.-WP HC Rep	North-West Province High Court Reports
OC	Oudh Cases
Ori	Orissa
OS	Old Series
Pat	Patna
Pat LJ	Patna Law Journal
PC	Privy Council
Pesh	Peshawar
PLD	All-Pakistan Legal Decisions
PR	Punjab Record

Punj	Punjab
P Wms	Peere Williams
QB	Queen's Bench
QBD	Queen's Bench Division
Raj	Rajasthan
Rang	Rangoon
Russ	Russell
SALR	South African Law Reports
Saur	Saurashtra
SCC	Supreme Court Cases (India) Supreme Court Circular (Sri Lanka)
SBE	Sacred Books of the East (Oxford)
SCJ	Supreme Court Journal
SCR	Supreme Court Reports
SC	Supreme Court
SDA	Sudder Dewanny Adawlut
Se1 Rep	Select Reports
Sim	Simons
SN	Short Notes
TLL	Tagore Law Lectures
TLR	Times Law Reports
TR	Term Reports
Trav-Co	Travancore-Cochin
Tri	Tripura
Vas.	Vasistha-dharma-sutra
Vaugh	Vaughan
Vern	Vernon

Ves	Vesey
Vis.	Vishnu-smṛti
Wilm	Wilmot's Notes of Cases
WR	Weekly Reporter
Yajn.	Yajñavalkya-smṛti

P R E F A C E

The purpose of this study is to bring to light some of the problems that are cropping up in family laws of South Asian countries either due to unhappy wording of some statutes in connection with the alienation of a minor's property by his guardian, for example, section 11 of the HMGA of India, or unjust application of the principles of one personal law into another, as in the case of application of limitation law in connection with the improper alienations by Hindu de facto guardians, or the denial of any power to guardians without courts' permission to deal with minors' properties as in Sri Lanka.

The law relating to minors, being an independent system developed by the laws of Parliaments and case-law, finds little treatment in the text-books of personal laws: while it needs fresh treatment to clear up the hazy atmosphere created around it by the massive case-law. In the Subcontinent excepting the recent HMGA of India the Acts of Parliament relating to the guardianship of minors state in general terms the powers and duties of guardians who do not take a certificate from the court to deal with minors' properties, and still none where the guardian is a guardian in case of need or de facto guardian. The personal law text-book writers deal with guardianship for the limited purpose of marriage and a little of custody of minors'

person, and leave the law regarding minors' property to be treated by writers dealing with the general principles of law relating to minors. But unfortunately very few writers have spent their labour in this respect. Excepting Sir E.J. Trevelyan's book 'Law Relating to Minors as administered in the provinces subject to the High Courts of British India' no other major work may be found in this field; but that too has become outdated, the last edition being published in 1929. Besides Trevelyan's book, all other few books are mere annotations of the GWA of 1890 and the HMGA of 1956. Among them B.B. Mitra's and M.W. Pradhan's books are worth mentioning, but the writers have hardly discussed any problem that might arise in the practical application of the provisions of guardianship Acts. Recently Narmada Khodie even does not consider the law of guardianship as a subject of Civil law; in her Readings in uniform Civil Code she did not feel to include any writing on guardianship. In Sri Lanka it is even more difficult to find any consistent treatment on this subject. Dr. H.W. Tambiah who is the most prolific writer on almost all aspects of the laws of Sri Lanka has devoted a few pages in discussing the guardianship of person of minors, but he has not done anything particularly in respect of the guardianship of minors' properties.

Rapid change of the society, growing new needs of the people and their constant grappling with an inflationary

finance have increased the value of property. Therefore, the care and protection which a minor's property needs may also have changed, but the law has not been changed. The judges look to guardianship cases from the point of view of the welfare of the minors, but hardly do they consider the interest of a bona fide purchaser for value; while as a matter of fact protection of purchasers is essential for the ultimate benefit of the minors! Sometimes Parliaments of the Subcontinent being inspired by the Western systems and assuming an idea of protecting the interests of minors pass legislation either to abolish some age-old institution of guardianship or restrict the powers of some guardians hitherto unknown without foreseeing the inconveniences of such abolition or restriction. In this work an attempt is made to highlight the problems that are caused due to this partial attitude of the judiciary or immature legislation. A keen observer of Indian life, Derrett, has raised some of the problems in his Critique; he has also hinted at the solutions of some of them but not in detail. A detailed analysis of the problems and their solutions in the present social and economic perspective have been attempted in this thesis.

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C H A P T E R I

LAW OF GUARDIANSHIP IN GENERAL

1. Meaning of guardianship

In this work we will deal only with the guardianship of minors. Although lunatics and idiots may need guardians, like minors, to look after their property and sometimes their persons, the provisions applicable to the protection of their persons and management of their property do not form part of the general law of guardianship. The word 'guardianship' implies the relation that exists between a guardian and a ward¹, it signifies an office² or a position that a guardian holds. Whether this office is a remunerative one or not depends on the nature of relationship in which a guardian stands to the minor ward and also on the mode

1 Webster's Third New International Dictionary (Massachusetts, U.S.A.: 1961), 1007.

2 The Oxford English Dictionary (Oxford: 1961), 482. Lord Macclesfield did not like to call guardianship an office, because in it he found the guardian having an interest in a minor's estate, namely, the guardian could bring an action in his own name, could make leases of the minor's property, etc. See Eyre v. Countess of Shaftsbury (1722) 2 P. Wms. 103, 122; 24 ER 659, 665. But actually they cannot be called interests, they are appurtenant to the office itself. Guardianship is virtually an office, and from it guardians derive their authority, in it the activities of guardians are in the interests of minors, and it terminates when the minor is 'mature enough to look after his own affairs'. See S.J. Stoljar, 'Children, Parents and Guardians', in (1973) 4/7 International Encyclopedia of Comparative Law, 27, sec. 61. In Continental law it has become a public office. See W.W. Buckland, Equity in Roman Law (London: 1911), 109.

of appointment¹. Guardianship is a right, a duty and above all a trust². It is a natural right of parents to be appointed as guardian of their minor children, unless they are otherwise disqualified; it is a claim of the minor's near relations to be preferred to strangers to be appointed as guardians of their minor relations, if they do not suffer from any disqualification in consideration of the minor's welfare. But it is more a duty than a right; it demands a constant duty which is to be exercised only for the benefit of the minor³ until he attains majority, and even for a certain period after majority as in the case of accounts. The parents have got a natural duty⁴ towards their minor children to rear them with parental care and affection⁵. Guardianship is, indeed, a trust for the care of the persons⁶ as well as of the property⁷ of minors. It

1 Generally where the guardians are parents they do not take any remuneration, so also the near relations. In the case of testamentary guardians, unless it is provided in the testament, they cannot take remuneration. When guardians are appointed from among persons other than natural guardians, the court may provide for their remuneration. See section 22(1) of the Guardians and Wards Act (Act 8) of 1890.

2 Sir E.J. Trevelyan, The Law Relating to Minors (London: 6th ed., 1926), 48.

3 J.D.M. Derrett, Introduction to Modern Hindu Law (Oxford: University Press, Bombay, 1963), 47, para 46.

4 Queen v. Gungo Singh (1873) 5 N.-W.P. HC Rep 44; Queen Empress v. Mir Chia (1896) 18 All 364. See also sections 32 and 317 of the Indian Penal Code (Act 45) of 1860.

5 Empress v. Bauni (1879) 2 All 349.

6 Wellesley v. Wellesley (1824-34) All ER 189.

7 Duke of Beaufort v. Berty (1721) 1 P. Wms 703; 24 ER 579.

is a trust to look after the physical and mental well-being of minors, it is a trust to maintain the status quo of minors' property¹. Romilly, M.R. observed²;

"The relation of guardian and ward is strictly that of a trustee and cestui que trust. I look on it as a peculiar relation of trusteeship ... A guardian is not only trustee of the property, as in an ordinary case of trustee, but he is also the guardian of the person of the infant with many duties to perform such as to see to his education and maintenance ... Of all the property which he gets into his possession in the character of guardian, he is trustee for the benefit of the infant ward".

Persons who are entitled by law to the custody or who assume themselves the custody of the person or property or both of minors are called guardians. The word 'guardian' generally means 'the person who holds the status of a guardian' and whenever it stands alone, it implies the guardian of the person of a minor³, even if appointed by the court⁴ unless there is any express direction. As long as the father is living no one else can be guardian⁵. Parents are regarded as natural guardians⁶. In common parlance, of course, the concepts of parent and guardian are quite distinct, "for the rights and duties of the former

1 W.S. Holdsworth, A History of English Law Vol. 3 (London: 1923), 513; the same Vol. 6 (London: 1924), 649; W.P. Eversley, The Law of Domestic Relations (London: 3rd ed., 1906), 606.

2 Mathew v. Brise (1851) 14 Beav 341, 345; 51 ER 317.

3 Rimington v. Hartley (1800) 14 Ch D 630, 632 per Jessel, M. R.

4 Re Willoughby (1885) 30 Ch D 324, 330 (CA).

5 Re Marquis of Salisbury and the Ecclesiastical Commissioner (1876) 2 Ch D 29, 35-36 (CA).

6 Under Muslim law among the parents father alone is the natural guardian. See N.B.E. Baillie, A Digest of Moohummudan Law Vol. 1 (London: 2nd ed., 1875), 689.

arise automatically on the birth of a child, whilst the latter voluntarily places himself in loco parentis to the ward and his rights and duties flow immediately from this act"¹.

2. Necessity for guardians

The minors are by reason of their tender age incapable of taking care of themselves and their properties. They are inexperienced and unable to form any accurate decision or to come to any just and farsighted conclusion on matters which intimately concern their personal welfare and specially the administration of their property. Advantage of their physical weakness or defective judgment may be taken by others. So they need other adult persons who would be charged with the duty of taking care of their persons, administration of their property, and of generally looking after their interests. Such persons are termed guardians. The immature intellect and imperfect discretion of the minors have made them incapable of exercising any civil rights or performing any civil duties. Law does not recognise any contractual capacity in them². So in ordinary life and commerce they are in a disadvantageous position. Even if they are in extreme necessity or their goods demand immediate disposition, nobody would like to transact with

1 P.M. Bromley, Family Law (London: 4th ed., 1971), 319.

2 Indian Contract Act (Act 9) of 1872, section 11. See also Mohori Bibee v. Dhurmodas Ghose (1903) 30 IA 114 (PC).

them, since nobody wants to purchase litigation thereby. Indeed the disabilities of the minors and their legal incapacity to manage their own affairs render it necessary that they should have guardians of their persons and property¹. So long as the parents are living they afford or are expected to afford the necessary care for their minor children, to protect their property, if any, and to effect transactions wherever required, with others. But when they are dead or unfit to fulfil their duties, some other persons are required to provide the parental love and affection and to fulfil parental duties. The king or state as parens patriae assumes these responsibilities in respect of all minors, male or female, and delegates them to the courts² which in their turn repose them on their chosen representatives. The law of guardianship may be said to be based not only on the need of minors' physical care and protection from adverse circumstances in the society, but also on the requirement of protection of their properties and of supplementing their contractual inabilities.

3. Types of guardianship and their guiding principles

As seen above guardianship may be broadly divided into guardianship of person and of property, and the

1 Halsbury's Laws of England Vol. 21 (London: 3rd ed., 1957), 203.

2 Ram Bunsee Koonwaree v. Soobh Koonwaree (1867) 7 WR 321, 325 (CR); Abdul Ghani v. Sardar Begum AIR 1945 Lah 183.

guardians under each of them may be either (a) natural, (b) testamentary or (c) court-appointed. When the custody of the person of a minor is assigned to a guardian he becomes the guardian of the minor's person and the relation between him and the minor is like that of a parent and child; he stands in loco parentis to the minor. He is expected to supplement the parental love and affection to the minor and all his efforts should be towards the attainment of the minor's physical and mental welfare. Generally as long as the parents are alive, nobody else is appointed to this guardianship. But when a guardian is appointed to the property of a minor he is called the minor's property guardian and he bears a resemblance to a trustee. In his dealings with the minor's property he is expected to exercise the same care and skill as a man of ordinary prudence would do with his own property.

4. Union of guardianship of person and of property

Sometimes the same person is entrusted with the guardianship of both the person and the property of a minor¹. It is doubtful unless the guardian is a parent or an executor, how far such union fulfils the actual purpose of guardianship. The fundamental principle of guardianship being protection of the person as well as the property of a minor, such a union may not be always

¹ Mathew v. Brise (1851) 14 Beav 341, 345; 51 ER 317;
Duke of Beaufort v. Berty (1721) 1 P. Wms 703; 24 ER 579.

desirable. What is required for the welfare of the person of a minor is parental care and affection from a guardian, while what is required for the welfare of the minor's property is the skill and circumspection which a man of ordinary prudence exercises for the preservation of his own property. One who is willing to protect the person of a minor with almost parental love and affection may not protect the minor's property. Parental affection and selfless protection of property may hardly live together in the same individual excepting parents. Guardianship of person and that of property demand contrary consideration for their respective purposes. For the care and protection of a minor's person a certain class of people may be desirable because of their love towards the minor, but that class of people may have detrimental interest in the minor's property. Instead of protecting the property they may convert or divert it to their own use and enjoyment.

The paramount consideration for the appointment of the guardian of a minor's person is the minor's welfare and this can be achieved through the love and affection of the person to be appointed. Davar, J., observed¹:

"In making orders appointing guardians for the persons of minors the most paramount consideration for the judge ought to be --- which order under the circumstances of the case would be best for securing the welfare and happiness of the minors? With whom will they be happy? Who is most likely to contribute to their well-being and look after their health and comfort? Who is likely to bring up and educate the minors in the manner in which

1 In re Gulbai (1908) 32 All 50, 54.

they would have been brought up by the parents if they had been alive? In fact the main question for the court to consider in the case of the unfortunate minors who have lost their natural guardian is --- who amongst the relations or for the matter of that, friends of the minors can you select who will supply as nearly as possible the place of their lost parents".

Usually such parental love and care is expected to flow from closer blood relations of the minors¹. Under Hindu law in the determination of nearness of blood, the paternal kinsmen are preferred to the maternal ones², because they are presumed to feel natural love and affection for the minors; while under Muslim law it is presumed to flow not from any male, including the father, but from female relations³ and for this reason the 'hizanut' or custody of minor children is given to mother and failing her to other female relations under the general supervision of the father who is expected to finance the maintenance of the minors.

The filial love and affection which is required of a guardian for the personal welfare of a minor is not needed by the property of a minor. What it needs, as is often supposed, is only the protection in the sense of maintaining status quo. How much this protection may be provided by near relations is a matter to be considered. The care and affection of the minor's relations hardly

1 Bindo v. Sham Lal (1907) 29 All 210.

2 Sir T. Strange, Hindu Law Vol. 1 (London: 1830), 71; the same, Vol. 2, 72-74; J.D. Mayne, Hindu Law and Usage (Madras: 11th ed., 1950), 300 section 231.

3 Rashida Begum v. Shahab Din PLD 1960 Lah 1142, 1178.

survives when it comes into clash with their personal interests which they may have in the minor's property, i.e., when they have an expectation of inheritance in the property of the minor. As said earlier, in the case of guardianship of the person of a minor the principle of nearer blood relations may ensure parental care and affection, but the same principle might act detrimentally to the minor's interest in property. The welfare consideration which is there in the case of guardianship of a minor's person is also there in the case of guardianship of a minor's property, but in the sense that the minor's property will be conserved by the guardian for the future use by the minor. The guardian is expected to protect the property for the benefit of the minor, but if the guardian himself becomes interested in the property itself, he may not hesitate to remove "the incumbrance of his pupil's life from that estate"¹. Kautilya² looked with suspicion upon the assignment of guardianship of the property of a minor to his agnatic relations who may inherit the property on the minor's death. He recommended keeping the minor's property either with maternal relations or in their absence with village elders. Almost in the same words Blackstone

1 Blackstone, Commentaries on the laws of England Vol. 1. (Oxford: 1775), 461.

2 Kaut. III. 5; P.V. Kane, History of Dharmasastra Vol. 3 573.

observed¹;

"Where the estate descended from his (infant's) father, in this case his uncle by the mother's side cannot possibly inherit this estate, and therefore shall be the guardian".

For the protection of a minor's individual property its guardianship should be given to persons who may have no interest in that property; and for the security of the minor's life it would be wise to separate the guardianship of person from that of property. When a minor is kept under the custody of his 'next of kin to whom the land may descend', his property should be kept by the court with a guardian appointed from among persons indicated by Kautilya. Although Kautilya and Blackstone did not say expressly that a union of guardianship of person and that of property in an expectant heir of a minor may result in the murder of the minor, Lord Macclesfield expressed the doubt in the following words²:

"It is very shocking to think that any brother or uncle would commit murder upon his own brother or nephew to get his estate".

Lord Macclesfield did not approve of Blackstone's views of law on this point and vehemently criticised it in the following words³:

"Surely the maxim, that the next of kin to whom the land cannot descend is to be guardian in socage, is not grounded upon reason, but prevailed in barbarous times before the nation was civilised".

1 Blackstone, Commentaries Vol. 1, 461; Coke, The laws of England [ed. by J.H. Thomas] Vol. 1 (London: 1818), 337-38; Coke upon Littleton [ed. by Thomas Coventry] (London: 1830), 88b.

2 Justice Dormer's case (1724) 2 P. Wms 262, 265; 24 ER 723, 724.

3 Ibid.

But he did not rule out the principle altogether. He based his decision on the long standing tenderness of the guardian in that case. Moreover, that was a case of a lunatic who was maintained for long thirty-two years by his uncle, Justice Dormer, to whom the custody of the lunatic's property was given. What Lord Macclesfield could not believe in the early 18th century came true before the Madras High Court in the late 50s of this century. Sometimes a guardian's transaction of a minor's property may not be upto the satisfaction of the latter and it is most likely in the Indian society that the minor commits suicide for the loss of his property; or sometimes it happens that in order to grab the minor's property the relation with whom the minor lives and who acts as his guardian does not give the minor sufficient food and medical care, and this exposes him to diseases which cause him to commit suicide or die prematurely. In Palani Goundan v. Vanjiakkal¹ a minor who was living with one of his relations committed suicide when the latter acting as the minor's guardian sold the minor's property.

Of the two considerations, viz., physical well-being and security of life, undoubtedly the latter demands more attention of the court. Where guardianship is simply that of the person of a minor, nearest blood relations are by far the best guardians; but where it involves property

¹ AIR 1956 Mad 476.

due considerations should be given to all factors. If guardianship could result in the loss of the minor's life, it becomes a negation of the whole conception of the institution of guardianship and a dastardly disregard by the court of a sacred duty delegated to it by the state. Once a person is lawfully appointed a guardian, he is entrusted with the minor's person or property or both. Indeed when a court unites the guardianship of both in the same person, it must not exercise its discretion to be turned into a murderer. So far as a minor's property is concerned a guardian is expected to exercise as much care as a man of ordinary prudence would do if it were his own property. In the exercise of this duty can he deal with the minor's property? If he can, under what circumstances and to what extent he is allowed to do it? Let us see how was the law in the following systems from which the present law of the area under our study has evolved.

5. Guardianship in different systems

5.1. Roman law

In Roman law as long as the parents were alive, the natural relationship of parent and child protected the minor children from the dangers to which their immaturity and inexperience exposed them. In the absence of parents their place was taken by guardians. In Roman law the question of guardianship did not arise so long as the

paterfamilias was alive. On his death his place was taken by a guardian appointed by his will, or in the absence of a testamentary guardian, by one appointed by the minor's agnatic near relations, or in the absence of both, by one appointed by the court. Among the parents father was the natural guardian of his legitimate children until they attained the age of puberty. From that age until the age of twenty-five another type of guardian was appointed to them¹. When the father was living he was alone entitled to the custody of his children and was responsible for their support and education. When he died without appointing any guardian by will, the mother could become the guardian of her minor children, if she gave a declaration that she would not marry again². But she could not herself appoint a guardian for her minor children³, nor was her guardianship extended to the property of the children⁴. In the absence of a testamentary guardian and the mother's declaration of 'no marriage' the minor children were placed under the guardianship of a person selected from among the agnatic kins, i.e., the male members of the family. The appointment used to go to the nearest male agnates, e.g., brother, uncle or cousin, that is, someone who upon the minor's death might become his heir⁵. The guardians

1 Curator was appointed for a person between puberty and twenty-five years of age.

2 W.W. Buckland, Equity in Roman Law, 150-151.

3 Buckland and McNair, Roman law and Common law (Cambridge: 2nd ed., 1952), 52.

4 Mackenzie, Roman law (London: 7th ed., 1898), 157.

5 J. Muirhead, Historical Introduction to the Private law of Rome (London: 2nd ed., 1899), 117, sec. 28; T.C. Sandars, Institutes of Justinian (London: 7th ed. 13th impression, 1910), 54.

were not responsible for the custody or education of minors beyond the provision of funds from the minor's estates¹.

Unlike Common law in early Roman law guardianship was less in the interest of the minor than in that of the guardian², and its primary purpose was the protection of the property for successors, although this did not exclude protection of the interests of the minor³. And perhaps for this the Romans entrusted guardianship of both the person and property of a minor to the same individual⁴.

As regards the property of a minor the Roman guardians used to perform two functions, viz., administratio (negotiorum gestio)⁵ and auctoritatis interpositio. Under the former they were allowed to carry out business transactions on behalf of minors, and under the latter they used to supplement the legal incapacity of the minors with their auctoritas by giving authorisation to transactions carried out by the minors themselves⁶. This is

1 Buckland and McNair, Roman law, 52.

2 W.W. Buckland, A Manual of Roman Private law (Cambridge: 1925), 88, sec. 33.

3 W.W. Buckland, The Main Institutions of Roman Private law (Cambridge: 1931), 79, sec. 27.

4 Blackstone criticised the Romans for such a union of guardianship of a minor's person and property in the same individual. See Blackstone, Commentaries Vol. 1, 462.

5 Buckland, Manual, 95, sec. 35.

6 Ibid.

completely absent in the Common law where no amount of approval by guardians could enlarge a minor's contractual capacity. Negotiorum gestio was a quasi-contractual relation. To constitute it¹ it was necessary that the business in which the gestor interfered should be someone else's and not his own (he would be an uninvited stranger)², and that his interference should not be grounded on any office or express mandate. Transactiona entered into by guardians including negotiorum gestores with regard to minors' immovable property without the sanction of courts were binding on the minors, if they were advantageous to and ratified by them on attaining majority³.

Under Roman law guardians had large powers of alienation⁴ and acquisition on their minors' behalf with the leave of the court. But law strictly controlled the powers of a guardian as regards the administration of a minor's property. Since as an agnatic relation the guardian was the minor's potential heir, and since he had also the right to act in place of the minor and in his own name, Roman law tried from the very beginning to set rules to control 'the selfish temptations to which the guardians were open'. It put the guardians under a constant duty to act according to the dictates of fides⁵--- "an honest and conscientious

1 W.W. Buckland, Elementary Principles of Roman Law, (Cambridge: 1912), 304.

2 Moyle, Imperatoris Justiniani Institutiones (Oxford: 5th ed., 1912), 456.

3 M. Donaldson, Minors in Roman-Dutch law (Durban: 1955) 43-44.

4 Buckland and McNair, Roman law, 52; Buckland, Equity, 108.

5 Muirhead, Historical Introduction, 120.

regard for the interests of the ward", a fraudulent breach¹ of which was noticed by the Civil law. Other remedies were also available to punish a guardian for his malpractices, and an action ex delicto for double value could be instituted against him for conversion of his ward's property. Whenever a guardian's administration was suspected anyone could bring an action to force his removal. Again, an action of account could be brought against him at the end of his guardianship in which he could be charged either with his deliberate mismanagement or failure to exercise as much care as he would take of his own affairs. Thus a guardian in Roman law became²:

"A complete fiduciary whose principal duty it is not only to act for the ward's benefit, but to preserve as much as possible of his property; a duty, indeed, which was to become famous since it also entailed two typical obligations, namely, that a guardian can make no gifts out of his ward's property and that wasting assets must be sold and invested in permanent (typically immovable) capital".

5.2. English law

At Common law guardianship developed first along the feudal and then commercial lines to be turned into a valuable commodity, a profitable right³ which used to be controlled by the Tudor Court of Wards⁴, and enjoyed

1 Buckland, Institutions, 79, sec. 27.

2 Stoljar, 'Children, parents and guardians', in (1973) 4/7 IECL, 28, sec. 64.

3 Pollock and Maitland, The History of English law Vol. 2 (Cambridge: 1923), 442.

4 J. Hurstfield, The Queen's Wards (London: 1958), 16-17.

only by the feudal lords and not by any family members or relations of the minor, agnatic or cognatic. In early law guardianship usually depended on the ownership of property. Unless an orphan minor had any property, no guardian could be appointed for him¹. Where he owned land either his military lord, if the land inherited was held by knight service, or his lay lord, if the feudal tenure was in socage, would be the guardian of his body and estate. Where the orphan minor had only money or goods obtained on bequest, and no land, the ecclesiastical courts protected the minor by obliging the executor to retain the estate for the minor's benefit². But neither the ecclesiastical nor the Common law took any interest in a minor if he was left with nothing, land or chattels. The king's prerogative protection as parens patriae was not effectively extended to him until the Court of Wards was dissolved and the Court of Chancery began to intervene in matters of guardianship.

As long as the father was living³ at Common law he was the sole guardian⁴ of the persons of his minor

1 T.F.T. Plucknett, A Concise History of the Common law (London: 5th ed., 1956), 545.

2 Pollock and Maitland, History of English law Vol. 2, 442.

3 Blackstone, Commentaries Vol. 1, 461; Ratcliff's case (1592) 3 Co. Rep 37a, 38b; 76 ER 713, 721; R. v. Thorp (1697) Carth 384; 90 ER 824; Re Marquis of Salisbury and Ecclesiastical Commissioners (1876) 2 Ch D 29, 34-36 (CA).

4 Cotton, L.J., observed in Re Agar-Ellis, Agar-Ellis v. Lascelles (1883) 24 Ch D 317, 334 (CA): "... by birth, a child is subject to a father, it is for the general interest of families, and for the general interest of children, and really for the interest of the particular

(contd)

children and after his death the mother¹ was entitled to their custody if the father did not supersede her right by appointing a testamentary guardian². The mother was not allowed any testamentary power. Where a minor had no parent or testamentary guardian the court on application appointed guardians. In the selection of persons to be appointed the court "according to its ordinary practice, gives preference to the nearest blood relations, and does not appoint strangers when fit persons are to be found among relations"³.

Although Common law allowed the father to be the paramount guardian of the persons of his minor children, it did not extend this guardianship to the property of the children⁴. He had no rights over their real estates which vested in the persons entitled to the legal estates in the minors' hands⁵. If he⁶ or the mother⁷ of the minors

(contd) infant, that the court should not, except in very extreme cases, interfere with the discretion of the father, but leave to him the responsibility of exercising that power which nature has given him by the birth of the child".

1 Blackstone, Commentaries Vol. 1, 461; Mellish v. De Costa (1737) 2 Atk 14; 26 ER 405; Mendes v. Mendes (1747) 3 Atk 620; 26 ER 1157; Queen v. Clarke (1857) 7 E & B 186, 200; 119 ER 1217.

2 Tenures Abolition Act (12 C. II, c. 24), 1660, sec. 8.

3 Re Nevin (1891) 2 Ch 299, 303.

4 If the circumstances required the father could be appointed the guardian of his minor child's property. See R. v. Thorp (1697) Carth 384; 90 ER 824.

5 R. v. Sherrington (1832) 3 B & Ad 714; 110 ER 261.

6 Morgan v. Morgan (1737) 1 Atk 489; 26 ER 310; Thomas v. Thomas (1855) 2 K & J 79, 84-86; 69 ER 701, 703-704.

7 Well v. Stanwick (1887) 34 Ch D 763.

entered the children's property he or she was treated as trustee and was liable to accounts for rents and profits received therefrom.

Unlike Roman law Common law did not favour the union of guardianship of person and of property in the same individual¹. It split them up into two offices and reposed them in different individuals. A guardian of the person of a minor had no authority over the minor's property², and a guardian of his estate had no authority over his person³. At Common law the custody of the property of a minor had to be given to the minor's friends or next of kin 'to whom the inheritance cannot possibly descend'⁴. The guardian had to keep the property safely until the minor attained the age of majority. He had to act so far as possible according to the idea of leaving matters in status quo till the minor came of age⁵, and to preserve the property more or less intact. At a period when inflation was imperceptible this could hardly be objected to. He was allowed to do what was needed for the administration of the minor's property, such as letting farms, keeping down encumbrances, investing money in the purchase of lands⁶.

1 H. Seton, Forms of Judgments and Orders in the High Court and the Court of Appeal (London: 7th ed., 1912), 951.

2 Re Marquis of Salisbury and Ecclesiastical Commissioners (1876) 2 Ch D 29, 36 (CA).

3 Re Pavitt (1907) 1 IR 234.

4 Blackstone, Commentaries Vol. 1, 461.

5 Holdsworth, History of English law Vol. 3, 513; Vol. 6, 649.

6 Earl of Winchelsea v. Norcliffe (1686) 1 Vern 403; SC 435; 23 ER 545, 569.

But he was not allowed to make any waste, sale or destruction of the said property. Where he wished to act on behalf of the minor he should get the sanction of the court for the payment of money for the minor's maintenance¹ or for any other acts for the latter's benefit²; otherwise he would be removed from guardianship for the abuse of the minor's property³. He could not apply any portion of the minor's property for the payment of the minor's ancestor's debts, as a minor could not be forced by his ancestor's creditors for the payment of debts as long as he was under age⁴. Unless specifically empowered he could not grant a lease for any longer term than the infant's minority⁵. At the end of guardianship a guardian had to submit an account of the property, but he was allowed to get reasonable costs for the maintenance of the property⁶. Guardianship was virtually turned into an office of trust⁷.

1 Englefield v. Englefield (1691) 2 Vern 236; 23 ER 753.

2 Cecil v. Satisbury (1691) 2 Vern 225; 23 ER 745. A long term lease was granted in this case and the court allowed the lease since it was considered to be for the benefit of the minor.

3 Holdsworth, History of English law Vol. 6, 650; Stoljar, 'Children, parents and guardians', in (1973) 4/7 IECL, 33, sec. 76; see also Bedell v. Constable (1668) Vaugh 177; 124 ER 1026.

4 Pollock and Maitland, History of English law Vol. 2, 441.

5 J.D. Chambers, A practical treatise on the jurisdiction of the High Court of Chancery over the persons and property of infants (London: 1842), 309-310; W. Macpherson, A treatise on the law relating to infants (London: 1842), 501.

6 Coke, Laws of England Vol. 1, 160; Coke upon Littleton 88b.

7 Holdsworth, History of English law Vol. 3, 512-13; A.W.B. Simpson, An Introduction to the History of land law (OUP: 1961), 17-19; see also Wellesley v. Wellesley (1824-34) All ER 189.

After the dissolution of the Court of Wards, the Court of Chancery began to exercise its control over minors' guardians. This was a delegation by the Crown of its prerogative rights as parens patriae of looking after their interests¹. As regards the custody of the person of a minor equity concurred with Common law² and supported the father's paramount right to it. This right could be refused by the courts on a number of factors which guided the welfare of a minor; and equity began to refuse it much more readily than Common law, if there was any threat of physical or moral harm to the minor³. In such refusals the courts were to act judicially⁴.

1 Falkland v. Bestie (1696) 2 Vern 333, 342; 23 ER 814, 818. It was observed in this case: "In this court (Court of Chancery) there were several things that belonged to the king as pater patriae, and fell under the care and discretion of the court, as charities, infants, idiots, lunatics, etc., afterwards such of them as were of profit and advantage to the king were removed to the Court of Wards by the statute; but upon the dissolution of that Court, came back again to the Chancery".

2 P.H. Pettit, 'Parental control and guardianship', in R.H. Graveson and F.R. Crane, ed., A Century of Family Law (London: 1957), 56-86.

3 Fitzgibbon, L.J., observed in Re O'Hara (1900) 2 IR 232, 240-241:

"The court, acting as a wise parent, is not bound to sacrifice the child's welfare to the fetish of parental authority, by forcing it from a happy and comfortable home to share the fortunes of a parent, however innocent, who cannot keep a roof over its head, or provide it with the necessaries of life".

4 In R. v. Gynqall (1893) 2 QB 232, 241-242 (CA) Lord Esher, M.R. observed:

"The court is placed in a position by reason of the prerogative of the Crown to act as supreme parent of the child, and must exercise that jurisdiction in the manner in which a wise, affectionate, and careful parent would act for the welfare of the child, ... The court must exercise this jurisdiction (interference with parental right) with great care, and can only act when it is shown that either the conduct of the parent, or the description
(contd)

Equity, however, extended the mother's power of guardianship by allowing her, first a limited¹ and then an equal right² with the father to appoint testamentary guardians. Like Common law, equity did not approve of the vesting of guardianship of person and property in the same individual, although testamentary guardians³ and a surviving parent⁴ could have both guardianships united in them. In those cases they controlled the minor's property not as guardians but as trustees. The Law of Property Act (15 & 16 Geo. 5. c. 20) of 1925 virtually rendered guardianship of property obsolete in England, for in almost every case property in which a minor had an interest was vested in trustees. As under Common law, parents' guardianship was not extended to minor's property; so far as the property of a minor was concerned the court of Chancery put guardians under strict discipline. Recent legislation has given the mother a position equal to that of a father in respect of the guardianship of a minor's person and property. The

(contd) of person he is, or the position in which he is placed, is such as to render it not merely better but --- I will not say 'essential', but --- clearly right for the welfare of the child in some very serious and important respect that the parents' rights should be suspended or superseded; but ... where it is so shown, the court will exercise its jurisdiction accordingly".

- 1 Guardianship of Infants Act (49 & 50 Vict. c. 27) 1886, sec. 3.
- 2 Guardianship of Infants Act (15 & 16 Geo. 5. c. 45) 1925, secs. 4 and 5.
- 3 Tenures Abolition Act (12 C. II, c. 24), 1660, sec. 9; see also Duke of Beaufort v. Berty (1721) 1 P. Wms 703, 704; 24 ER 579; Mathew v. Brise (1851) 14 Beav 341; 51 ER 317, 319.
- 4 Guardianship of Infants Act 1886, sec. 4; Guardianship of Infants Act 1925, sec. 4(1) and (2).

Guardianship of Minors Act 1971 gave the mother an equal right to apply to the court in respect of any matter affecting the minor as were possessed by the father¹. This right has been further extended recently by the Guardianship Act 1973 under which the mother has been given rights equal to those of the father in respect of custody, upbringing and property of the minor².

5.3. Sastric Hindu law

Like Common law sastric Hindu law recognised the king as the ultimate guardian of the person³ and property⁴ of all minors, male and female. Parents were regarded as natural guardians and among them the father occupied the dominant position⁵ in the family. The respect⁶ which he commanded from, the power⁷ which he exercised over, and the duty⁸ which he owed to his children entitled him to the supreme custody of the person of his minor legitimate children; and after his death the guardianship went to the mother. In Hindu law guardianship of their minor children

1 Guardianship of Minors Act 1971, sec. 2.

2 Guardianship Act 1973, secs. 1 and 2.

3 Narada XII. 22.

4 Manu VIII. 27; Gautama X. 48; Vasistha XVI. 8-9; Vishnu III. 65.

5 Nar. I. 37.

6 Manu II. 145, 225, 227; IV. 162, 180, 183; Gaut. VI. 3-5; XXI. 15; Vish. XXXI. 1-3; Yajnavalkya I. 35, 157, 158; Vas. XIII. 48.

7 Vas. XV. 2; Baudhayana Parisista VII. 3-4.

8 Manu V. 151; IX. 4, 89, 90, 93; Nar. XII. 20-21; Vas. XVII. 69-70; Baudhayana IV. 1, 14; Gaut. XVIII. 20-22; Yajn. I. 64.

specially the male ones was more for the interests of the parents than the minors themselves as the sons were begotten to release the father from indebtedness¹. Sastric Hindu law, however, places women in perpetual dependence² on men like their Roman counterparts under tutela perpetua impuberum³, but that did not affect the mother's right to the custody of both the person and property of her minor children. No other female relations, e.g., step-mothers, were regarded as guardians. Where guardianship involved the performance of initiatory rites or the giving of daughters in marriage which the mother could not perform, her preferential right to guardianship was not lost thereby⁴. Those rites and ceremonies were performed by the paternal male kinsmen of the minor⁵. The parents could exercise their right of guardianship over the person of their minor children even when they were members of a joint Hindu family, but such a right over their unmarried daughters terminated

1 Nar. I. 5; Katyayana 551.

2 Manu V. 148; IX. 3; Gaut. XVIII. 1; Nar. XIII. 30-31; Vas. V. 1-2; Baud. II. 2, 3, 44, 45 (Sacred Book of the East Vol. 14, 231); Vish. XXV. 12, 13; Yajn. I. 85.

3 Buckland, Manual, 101, sec. 37; Jolowicz, Roman Foundation of Modern law (Oxford: 1957), 113-114.

4 Gour's view that the absolute dependence of women in ancient Hindu household left no room for assigning them any duties for the protection of her own children and that her right was of later growth and a product of jus naturale practised in courts cannot be accepted. [See H.S. Gour, Hindu Code (Nagpur: 4th ed., 1938), 280]. The view of Cowell that the mother's right to guardianship of her minor children was a product of custom cannot also be accepted [See H. Cowell, Hindu law (Calcutta: 1870), 152].

5 Yajn. I. 63.

as soon as they were married. In the absence of a natural guardian the guardianship of the minor's person devolved on the nearest male kinsmen who would be appointed by the king, the paternal relations having preference over the maternal.

Under the sastric Hindu law the guardianship of a minor's property depended on the character of the property, i.e., whether it was separate or joint, and also on the school of law to which the minor belonged. A minor could have an interest in a joint family property or he could have his own separate property obtained by inheritance, partition, gift or by earning. Where he had an undivided interest in a Mitakshara coparcenary property no guardian was required to be appointed unless all the male members of the family were minors. Until partition the whole coparcenary property including the minor's interest therein was managed by the manager or head of the family. And since the shares of coparceners including minor coparceners were not ascertained and since none of the coparceners could claim an individual property in it, no separate guardian was required to be appointed for the administration of the minor's interests therein. Even the natural parents could not be the guardian of their minor children's interests in the coparcenary property. Where the minor had a separate property, a guardian was necessary for the management, protection and in proper cases for the alienation of his property. Under the Dayabhaga law a son could not acquire

ownership by birth in ancestral property; there was hardly any distinction between ancestral and separate property as far as the father's power of alienation was concerned¹.

Minors, as the sastric law provides, had no contractual capacity², nor had they the ability to manage and administer their property³. Smṛti texts are available regarding the management, partition and alienation in fit cases of joint family property including the interests of minors, and also regarding the guardianship of minors' separate and individual property. The texts supply the basic principles of the law of guardianship in Hindu law and in some cases of Anglo-Indian law.

5.3.1. Joint Hindu family property and the alienation of minors' interests therein

Vijñānesvara in discussing the sources of a joint Hindu family property observes⁴:

"Therefore it is a settled point, that property in the paternal or ancestral estate is by birth, (although) the father have independent power in the disposal of effects other than immovables, for indisputable acts of duty and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress, and so forth; but he is subject to the control of his sons and the rest, in regard to the immovable estate, whether acquired by himself or inherited from his father or other

1 Kane, Dharmasastra Vol. 3, 576.

2 Manu VIII. 163; Nar. I. 39; IV. 10; Katya. 271; Strange, Hindu law Vol. 1, 271; Kane, Dharmasastra Vol. 3, 412.

3 K.R.R. Sastry, Hindu Jurisprudence (Calcutta: 1961), 136.

4 Mitakshara [Tr. by H.T. Colebrooke (Calcutta: 1810), 256-57] 1.1.27.

predecessor; since it is ordained, 'Though immovables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are born and they who are yet unbegotten, and they who are still in the womb, require the means of support, no gift therefore, be made'.

The immovable property of a joint Hindu family is held in collective ownership by all the coparceners including the minor coparceners, and is for the support of those who are in existence, those who are still in the womb and those who are yet unbegotten. Since none of the coparceners has any defined interest or ascertained share in this joint property, it cannot be disposed of by the father without the consent of all the sons. But where the family is in urgent need to raise money which cannot be done without disposing of the family property, and the family consists of some minor coparceners who cannot give consent, the coparcenary property may be transferred by a single coparcener without such collective consent. To meet such situations Vijnanesvara quotes from Brihaspati (subsequently cited in the Vivada-ratnakara) the following exception¹:

"Even a single individual may contract a donation, mortgage, or sale, of immovable property, during a season of distress, for the sake of the family, and especially for pious purposes".

Vijnanesvara gives his own explanation of the above verse in the following words²:

"While the sons and grandsons are minors and incapable of giving their consent to a gift and

1 Mitakshara 1.1.28; Ganganatha Jha, Hindu law in its sources Vol. 2 (Allahabad: 1939), 122.

2 Mitakshara 1.1.29.

the like; or while brothers are so and continue unseparated; even one person, who is capable, may conclude a gift, hypothecation, or sale, of immovable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indisputable duties, such as the obsequies of the father or the like, make it unavoidable".

This legal situation was applied quite literally towards the end of the 19th century in Mitakshara cases in Bengal and remained in vogue in Mysore state until 1950s¹. In a joint family if due to minority some members are incapable of giving their consent to alienation of family property, even a single coparcener who is qualified to do it, can give away, or mortgage or sell an immovable property in a season of distress, for the sake of the family and/or for pious purposes. The 'season of distress' implies that the whole family is affected by a calamity which cannot be averted without the transfer; 'for the sake of the family' means that the support of the family renders it necessary; and 'pious purposes' includes indispensable duties, such as the obsequies of the father, marriage of an unmarried sister, or the like which cannot be avoided. It is to be observed that the person effecting the transfer is, in all cases, a co-owner with the minor or minors in the joint family property and not a person having no interest in the property. A minor's interest in a joint family property can be disposed of in the above three exceptional cases only by a person having an interest in

¹ Derrett, Introduction, 273 para 442. See also Sakharam Sheku v. Shiva Deorao (1973) 76 Bom LR 267, 269.

the said family property and also having a contractual capability to supplement the minor's legal incapacity; in this latter respect he is actually representing the minor. A separate guardian for the minor's interest in such property is not required to be appointed, since he will not be allowed to deal with it. The father-manager of a joint family combines in himself the dual functions¹ of a manager of the whole family and a guardian of the minor's interest in it. The minor would be bound by his dealings with respect to the joint family property if any of the three conditions is complied with.

Under sastric Hindu law the mother had no power with regard to her minor children's interest in the joint family property, even where the manager was somebody else than the father of the minor children. Her guardianship was limited in such a case only to the custody of the persons of the minors.

Where minors held estates in co-tenancy with other co-tenants, neither any co-tenant, although he is a major, nor the minor's guardian could sell the minor's share in the said tenancy, since the property of a minor must be preserved until he attained majority². This is the basic sastric position³.

1 W.H. Macnaghten, Principles and Precedents of Hindoo law Vol. 1 (Madras: 1829), 103.

2 Nar. VII. 1, 3; Katya. 612.

3 Manu VIII. 27.

5.3.2. Minor's separate property and its guardianship

The parents were entitled to the custody of their minor children's separate property. As long as they were living, no one else could become the guardian of that property. Among the parents the father was the acknowledged guardian of his minor children's property and after him the guardianship of the property devolved on the mother. Unlike Roman and English law, sastric law recognised the mother's natural right to the guardianship of her minor children's property¹. Sastric law, however, does not give any direct information about the amount of prudence which a parent as guardian would exercise in the administration of the minor's property, but it is assumed that he or she should exercise the same care as he or she would do if it were his own. On the death of the parents the guardianship of the minor's property devolved on the king.

The sastric texts prescribe the king to protect the individual property of a minor until he attains the age of majority or return from pupillage. Manu says²:

"The king must protect the estate belonging to a minor heir until such time as he is either returned from pupillage or has reached the end of immaturity".

Estate here implies the whole assets³ which descend on the minor by inheritance⁴ and it goes under the protec-

1 Manu IX. 190.

2 Manu VIII. 27. See also Bharuci's Commentary on the Manusmṛti [Tr. by Derrett (Wisebaden: 1975)] Vol. 2, 99-100; Manusmṛti: The laws of Manu with the Bhāṣya of Medhatithi [Tr. by Ganganatha Jha (Calcutta: 1924)] Vol. 4 part 1, 38.

3 Bharuci's Commentary, 100.

4 Jagannatha Tercapanchanana, A Digest of Hindu Law [Tr. by H.T. Colebrooke (Calcutta: 1801)] Vol. 3, 542 (v. 449).

tion of the king only when the minor is without any natural guardian, 'having neither father nor mother'. 'Pupillage' refers to studentship in the teacher's house. This applied in historical times chiefly to Brahmins. The king delegates his responsibility to courts which in their turn appoint guardians from among the relations of the minor or others whom the courts would deem fit. The guardians would virtually carry out the king's responsibility. But whom would the courts appoint to represent the king? In explaining the above verse of Manu, Jagannatha expressed the apprehension that the other heirs might defraud the minor by taking the whole inheritance. But the learned commentator believed that if there were any co-heir whose trustworthiness was beyond doubt, the minor's share would be given to him in trust; otherwise, a guardian should be appointed from among others. Jagannatha observes¹:

"Consequently the meaning is, let him act in such a manner that other heirs may not take the whole, defrauding the infant, who is incapable from non-age of conducting his own affairs, or the sense may be, let him commit the share of the minor in trust to any one co-heir or other guardian".

Medhatithi in his comment on Manu's verse observes that because the minor's uncles and other relatives may quarrel among themselves as to which of them is the guardian of the minor's property, it is the exclusive duty of the king to take care of the minor's property. A rule similar

¹ Jagannatha, Digest Vol. 3, 542 (v. 449).

to Manu is also laid down by Vishnu¹, and Sankha-Likhita². Baudhayana³ and Vasistha⁴ extended the king's duty even to the protection of accumulations on the minor's estate which implies a procedure of calling for an account.

Katyayana⁵ mentioned the 'relatives and friends' of the minor with whom the other co-heirs of the minor should keep the property on partition⁶. But who are these 'relatives and friends'? Jagannatha in explaining the relevant texts of Katyayana assumes them to be minor's relations in the male line, or on failure of them, a sister's or daughter's son, or other near kinsmen of the father. In any case these persons could be heirs of the minor at Dayabhaga law. But the selection of a guardian from among them would not remove the apprehension of Jagannatha as seen earlier. Jagannatha in his comments on Katyayana's verses with his interpolations therein mentions specifically the 'maternal uncles or the like' as persons who can act as the guardian of a minor, and who can "take a loan from money-lender for the benefit of the minor, executing a

1 Vis. III. 65; SBE Vol. 7, 20; Digest Vol. 3, 542 (v. 450).

2 Digest Vol. 3, 542-43 (v. 451).

3 Baud. II. 2, 3, 36; SBE Vol. 14, 229-30; Jha, Hindu law Vol. 2, 523; Digest Vol. 3, 543 (v. 452).

4 Vas. XVI. 8, 9.

5 Katya. 845, 845A; Kane, Katyayanasmṛti (Poona: n.d.), 297.

6 On partition during the minority of a coparcener see Derrett, 'The minor's partition: a lapse in the Supreme Court', in AIR 1960 (Jour) 78; comments by B. Dayal on this article in AIR 1960 (Jour) 97, and its reply by Derrett in AIR 1961 (Jour) 10.

deed in the ward's name and in their name and it is legal if the money-lender advances after ascertaining that the guardian does not act fraudulently"¹. In pointing out the reason behind the arrangement of Katyayana Derrett says²:

"The motive is perfectly plain, if the property remained with agnates, especially the separating brothers or cousins, it would be extremely difficult for the infant heir to assert his separate rights and prevent deliberate or accidental embezzlements".

It is notorious in India that the maternal uncle is the child's best friend after his parents. Kautilya³ has directly said that on a partition of ancestral property the separating coparceners "shall deposit with the mother's kinsmen or with village elders, the share of those who have not attained majority, clearing it of debts, till they come of age". What Kautilya wants to say is this that the guardianship of a minor's property should not be given to a person to whom the 'inheritance can possibly descend'. He favoured a complete separation of guardianship of person from that of property where the person to be appointed is an heir of the minor. Whenever a person having the expectation of some interest or claim in a property is given in trust the management of that property, there is every likelihood that he may misuse the trust. A guardian's

1 Jagannatha, Digest Vol. 1, 16-18 (vv. 8, 9).

2 Derrett, 'The origins of the laws of the Kandyans', in (1956) 14/3 & 4 University of Ceylon Review, 105, 124.

3 Kaut. III. 5; R.P. Kangle, The Kautilya Arthashastra (University of Bombay: 1963) Vol. 2, 210; R. Shamasastry, Kautilya's Arthashastra (Bangalore: 1915), 204-205; Kane, Dharmasastra Vol. 3, 573.

temptation to acquire property may be a source of danger to the minor's life¹. Blackstone observes²:

"How much it is the guardian's interest to remove the incumbrance of his pupil's life from that estate for which he is supposed to have so great a regard".

Kautilya seems to be more logical in selecting guardians from among the maternal relatives or in their absence from the village elders and his views have great similarity with Common law³.

As mentioned earlier the sastric texts do not provide any direct provision about the duty and responsibility of a guardian towards the ward's property. Brihaspati⁴ and Narada⁵ observe that where a 'person offers himself for protection' or where a man 'takes charge of a boy with his wealth', the rules of bailment will be applicable with respect to that man's dealings with the minor's property. In other words the guardian would bear the same duties to his ward's property as a bailee to the bailor's. The guardian will be responsible for the loss of the minor's property in cases where a bailee would be responsible for the same to the bailor. The care which a guardian

1 See supra,

2 Commentaries Vol. 1, 461.

3 Ibid. Blackstone observes: "By Common law the guardianship (guardians in socage which takes place only when the minor has some estate in lands) devolves upon next of kin, to whom the inheritance cannot possibly descend". See also Coke, Laws of England Vol. 1, 160.

4 Bri. XII. 15; Vivada-ratnakara, 85, 96.

5 Nar. II. 15 (L. Sternbach, Juridical Studies Part I, 47); Nar. V. 15 (Kane, Dharmasastra Vol. 3, 460); Vivada-ratnakara, 96.

should take of a minor's property must be that of a bailee. Commenting on Narada's verse Jagannatha observes¹:

"Halayudha reads, if a man receive a poganda², or adolescent; consequently, according to him, the law respecting an infant received with valuable effects, is the same with that respecting deposits: it will be mentioned; and the whole of the law, declared under the head of deposits, must be understood. A deposit may occur in regard to an infant. Thus a child, whose father and mother are deceased, is bailed by the king or his officer, or by the child's maternal uncle; in this and in other cases a deposit arises".

In explaining the same verse of Narada Sternbach observes³:

"... the child, whose father and mother were deceased, was 'deposited' by the king or on his behalf with a man who had to take care of the orphan. As the orphan-minor could not dispose the estate left by his father, the guardian had to take care of him similarly as an object committed to his care".

But the writer hesitates to agree with Narada in classifying guardianship as a deposit, since he understands it as a tutela dativa. It makes, however, no difference, as a tutor dativus had 'similar pecuniary obligations towards the minor as a depositary towards the depositor'.

5.3.3. Bailment⁴ under sastric Hindu law

Under sastric Hindu law the depositary was not the possessor of the things deposited; they were in his detention

1 Digest Vol. 1, 408 (v. 11).

2 It means a minor.

3 Juridical Studies in Ancient Indian Law Part 1 (Delhi: 1965), 47.

4 The leading secondary authorities on this subject are Kane and after him Sternbach. See Kane, Dharmasastra Vol. 3, 454- 461; L. Sternbach, Juridical Studies Part 1, 29-108.

Niranjan Roy, 'Ancient Hindu law of pledges and bailments', in University of Calcutta, (1939) 32 Journal of the Department of Letters, 1-120, 50-87.

only. As Sternbach puts it¹:

"He had not animus possendi, he had not animus res sibi habendi, but had animus rem alteri habendi. The depositary according to ancient Indian law possessed the thing deposited in subordination to the depositor; therefore, the thing deposited was in his detention only. The depositary could not alienate the thing deposited".

The depositary could not give a valid title in the goods deposited to the transferee by sale, mortgage, gift or lease, as he himself had no title in them². Sastric law provides that if a bailee does not return³ or if he destroys the deposit owing to his own fault or negligence⁴ or uses the deposit for his own purposes⁵ without authority, he shall be punished like thieves⁶ and fined with an amount equal to the value of the deposit⁷ with interest⁸ at the rate of five per cent per month⁹ when he uses the deposit himself. The amount of care which a bailee is expected to exercise is that of a man of ordinary prudence. If the deposit is destroyed by the king, i.e., taken by the king¹⁰ on requisition or destroyed by an act of God or fate, or stolen by thieves¹¹, or destroyed along with the goods of

1 Juridical Studies Part 1, 52.

2 Bri. XII. 2; Nar. VII. 1.

3 Manu VIII. 191; Yajn. II. 66; Nar. II. 13.

4 Bri. XII. 10, 11; Katya. 596, 597; Nar. II. 7.

5 Yajn. II. 67; Nar. II. 8; Bri. XII. 12.

6 Nar. II. 13; Manu VIII. 191.

7 Nar. II. 13; Yajn. II. 66; Manu VIII. 192.

8 Bri. XII. 11.

9 Katya. 506; Kane, Katyayanasmr̥ti, 216.

10 Yajn. II. 66; Bri. XII. 10.

11 Yajn. II. 66; Nar. II. 12. See also Derrett, 'Nandakumar's forgery', in (1960) English Historical Review, 223-238.

the bailee¹, the bailee will not be made to restore the deposit or fined for negligence. Again, if the bailee restores voluntarily the deposit to the next kinsmen of the deceased depositor², or if the depositor, knowing himself the probable loss, deposits it³ and it is lost the bailee should not be punished or fined. It may, therefore, be presumed that even if the deposit alone is lost but without any fault of the bailee, the depositary will not have to compensate; but if it is lost by a fraudulent act on the part of the depositary, it must be compensated. The loss of bailee's goods along with the bailor's is assumed as the standard of care that is expected of the bailee. Jagannatha in illustrating the verses⁴ of Narada and Katyayana observes that the bailee will be liable "if fraudulently he place the thing deposited near an old wall or the like, while he places his own property elsewhere"⁵. In other words, the bailee must take as much care of the depositor's property as he would take if it were his own property.

Sastric law, therefore, requires the guardian of a minor's property to take the same care as he would take

1 Nar. II. 9; Katya. 598.

2 Manu VIII. 186.

3 Katya. 599; Kane, Katyayanasmrti, 241.

4 Digest Vol. 1, 421; Nar. II. 9; Katya. 598.

5 Digest Vol. 1, 421; Derrett, 'Nandakumar's forgery', in (1960) EHR, 223-238.

if it were his own property, and would be liable "in the same circumstances as a deposittee would be for loss of the minor's property"¹. Under sastric law the guardians were required to submit accounts of the profits and accumulations² on the minor's property; but they were allowed incidental expenses³ for the maintenance of the property.

5.3.4. Sastric rules and the payment of a minor's ancestral debts

Under sastric law a guardian was not empowered to pay off a minor's father's debts. Debts were no doubt considered binding⁴ on the minor sons, but the sastric law did not prescribe any rule that they should be paid immediately after the death of the father or during the minority of the sons. Narada⁵ says that debts incurred by a father or a coparcener need not be paid by the son or other coparcener before the lapse of twenty years, but he has not mentioned any time when the father who incurred the debt is dead. Katyayana⁶ mentions that they should be paid after the lapse of twenty years, even when the father is living but diseased or staying abroad. Vishnu⁷

1 Kane, Dharmasastra Vol. 3, 460-61.

2 Baud. II. 2, 3, 36; SBE Vol. 14, 229-30.

3 Katya. 845; Kane, Katyayanasmṛti, 297; Jha, Hindu law Vol. 2, 616 (v. 26).

4 Bṛi. XI. 48-49; Yajñ. II. 50; Nar. I. 2; Vish. VI. 27. Katya. 548, 559.

5 Nar. I. 14.

6 Katya. 548, Kane, Katyayanasmṛti, 227.

7 Vish. VI. 27.

however, indicates the date from which the period of twenty years should be computed. According to him the date should be counted from the date of the father's death or his becoming a sannyasin or leaving home for abroad. In any case sastric law allowed the sons a period of twenty years for the payment of their father's debts. The creditors could follow the assets inherited from the deceased, but they could not proceed against them for the liquidation of debts, until the minority of the sons terminates¹. This rule is similar to the Common law rule which states that an 'heir need not answer the demands of his ancestor's creditors so long as he is under age'². Jagannatha interpolating the verses of Yajnavalkya³, Katyayana⁴ and Narada⁵ attempted to make a distinction between minority and infancy, and inferred that it was only during the latter state that a son was exempted from liability for his father's debts. But if the verses are read shorn of the interpolations it would appear that no such distinction was intended in the original texts⁶. Where a guardian took charge of a minor's deceased father's assets he could not lawfully apply any portion of the said assets for the payment of the deceased's debts.

1 Macnaghten, Hindu law Vol. 1, 105.

2 Pollock and Maitland, History of English law Vol. 2, 441 f.n. 4.

3 Digest Vol. 1, 270 (v. 171).

4 Ibid, 291 (v. 187).

5 Ibid, 291-292 (v. 188).

6 Yajn. II. 51; Katya. 552; Nar. I. 5, 14, 23.

5. 4. Pre-British Muslim law

5.4.1. Guardianship of person

Muslim law also recognises the ruler or sultan as the parens patriae or ultimate guardian of all minors' person and property. The ruler's power in this respect is delegated to the courts which appoint guardians in the absence of any legal guardian. Unlike Hindu law Muslim law does not recognise the mother as the legal guardian of her minor children. It maintains a distinction between the custody of the person of a minor and the guardianship of his property. It keeps the minors under certain age under the care and affection of certain females and compels the father or legal guardians to bear the cost of maintenance of the minor. Like other laws Muslim law gives dominant consideration to the welfare of a minor in appointing his guardian; but it considers the females as possessing the love and affection which is necessary for the welfare of a minor's person. The requirement of this care and affection is determined according to the age and sex of the minor.

Muslim law makes a distinction between infancy and minority. As long as a boy has not attained the age of seven years and a girl, puberty it considers them incapable of taking care of themselves¹ and puts them in the custody of female relations. This custody is known as

¹ Under shia law the hizanut continues in the case of a boy until he attains the age of two years and a girl until she attains the age of seven years.

hizanut and it terminates when the boy completes seven years of age and the girl attains puberty¹. When the mother is living she is entitled to this custody, and her right is not lost after her divorce by the minor's father, but it may not subsist on her remarriage². Failing the mother the hizanut or custody belongs to the following females in the order mentioned below³:

- (1) mother's mother, how high soever;
- (2) father's mother, how high soever;
- (3) full sister;
- (4) uterine sister;
- (5) full sister's daughter;
- (6) uterine sister's daughter;
- (7) maternal aunt; and
- (8) paternal aunt.

In default of the mother and other female relations or when a boy has completed seven years or an unmarried girl has attained puberty the custody belongs to the following agnatic relations in the order given below⁴:

- (1) father;
- (2) nearest paternal grandfather;
- (3) full brother;
- (4) consanguine brother;

1 C. Hamilton, The Hedaya [ed. by S.G. Grady (London: 2nd. 1870)], 139; N.B.E. Baillie, A Digest of Moohummudan law Vol. 1 (London: 2nd. ed. 1875), 437-38.

2 Hedaya, 138.

3 Hedaya, 138; Baillie, Digest Vol. 1, 435-36.

4 Hedaya, 139; Baillie, Digest Vol. 1, 437-38.

- (5) full brother's son;
- (6) consanguine brother's son;
- (7) full brother of the father;
- (8) consanguine brother of the father;
- (9) son of the father's full brother; and
- (10) son of the father's consanguine brother.

But for her welfare the custody of a minor female child should not be entrusted to a male who is not within the prohibited degrees, and therefore a paternal uncle's son should not be given the custody of a female child, since 'there may be apprehension of treachery'.¹

The father is bound to provide maintenance² to his children when they are under the custody of their mother or other female relations and in the case of female children until they are married. As long as the minors have property of their own the maintenance would be provided out of that property³; but when they have no property of any description, it becomes the duty of the father to provide it from his own property; and he cannot avoid it unless he is indigent or in strained circumstances and physically unable to work⁴. Poverty alone is not a ground to refuse maintenance because if he is physically able to work he will be compelled to work for his children's maintenance and on

1 Hedaya, 138-39; Baillie, Digest Vol. 1, 437.

2 Hedaya, 146; Baillie, Digest Vol. 1, 460.

3 Baillie, Digest Vol. 1, 462.

4 Hedaya, 147.

refusal he may be imprisoned¹. The amount of maintenance is to be decided by the court according to the condition of the father and is to be delivered to the mother or other female relation who has the custody of the minor². Where the father is poor and the mother is rich, the mother may maintain the child with the leave of the court with a right of recourse against the father. The court may also order other agnatic kins of the minor to provide maintenance with a right of recourse against the father. The father may entrust the custody of his minor children to the executor by his will³, but it seems that he cannot thereby deprive the female relations of their right of hizanut.

5.4.2. Guardianship of property

In Muslim law, as in Roman and Common law, the minors are not incompetent to do such acts as are manifestly for their benefit⁴, but they are not competent to do any civil acts, such as purchase, sale, and the like. If they are done without any authority from their guardians, they will be unlawful; but if they are assented to by their guardians, they will be valid. In this respect Muslim law bears a similarity with Roman law. The guardians are required

1 Baillie, Digest Vol. 1, 460-61.

2 Ibid.

3 Ibid, 676.

4 Ibid, 518-19.

to supplement their minors' legal incapacity with their assent to the transactions which are being carried out by the minors themselves. What is needed in such cases is the minor's attainment of an age at which he could understand the difference between purchase and sale¹. Guardians are required to give validity to minors' acts where they have attained the age of discretion, or to act of their own when they have not and to manage and preserve their property. They must perform their duty with utmost good faith.

The guardian under Muslim law occupies the position of a wasi or trustee. Unlike the trustee of English law the property does not vest in him but he is entrusted with the management and preservation of it for the welfare and benefit of the minor. As long as the father is alive guardianship of his minor children's property resides in him. For the support and education of the children he can, if necessary, sell the whole of their property, movable and immovable. He may sell the property even to himself². He may enter into any contract beneficial to the minor children and is not fraudulently intended. He can deposit their property in trust. Muslim law gives due consideration to his tender affection to his children. Thus he is allowed to pledge their goods into his own hands or into the hands of persons over whom he has authority. He may pledge their goods in

1 Hedaya, 524.

2 Ibid, 639.

security for his own debts, but he will be responsible if the pledge is destroyed in the pawnee's hands. If the son on attaining majority redeems the goods by discharging the debt, he will have a claim on the father for the sum¹. The father may also pledge the goods of his son for a debt jointly due by both, but if the pledge is destroyed the father must compensate the son by a sum equivalent to his share of the debt. The father may incur necessary debts for the support and education of his minor son and the debts will become due on the minor's attaining majority; he may, however, pay them out of the minor's estate. Unlike a Hindu mother, under Muslim law a mother is not entitled to the guardianship of the property of her minor children².

Under Muslim law after the father's death the charge and control of the property of a minor is ordinarily assumed by the father's executor and unless a guardian is appointed, the executor should be considered the guardian of the property of the testator's minor children³. The validity of a guardian's transaction with a minor's movable goods depends on how much it is for the manifest advantage of the minor, how much it is immune from any fraud. A guardian may, therefore, enter into a contract which is advantageous and not injurious to the minors and is not entered into with fraudulent intention. He may sell, purchase, or pledge the whole of the minor's movable goods for the

1 Hedaya, 638-39.

2 Baillie, Digest Vol. 1, 129-30.

3 Ibid, 689.

support and education of the minor either for an equivalent or at a moderate lower price but not at a great and apparent loss¹. He may carry on trade on behalf of the minor and for this he can give and receive pawns². The guardian may pledge the minor's goods in security for his own debts, but unlike the father he cannot lawfully pledge the minor's goods into his own hands or into the hands of persons whom he can influence. Also, he is not permitted to sell or pledge anything belonging to him into the hands of the minor where he owes a debt to the minor. But where he purchases 'necessaries', e.g., food and raiment for the use of the minor and he has paid the price from his own money, he may pledge the minor's goods as security for the price paid. Like the father he may pledge the goods of the minor for a debt jointly due by both. But if the pledge is lost he must compensate the minor by an amount equivalent to his share of the debt.

With regard to a minor's immovable property the justification of a guardian's transactions depends on two principles, viz., first, how far the rule of status quo is observed, and secondly, how far the interests of creditors are safeguarded. Generally, a guardian is not allowed to sell the akar, i.e., immovable property of a

1 Hedaya, 702.

2 Ibid, 639.

minor as long as it is in a state of conservation; but for the benefit of the estate, such as where there is possibility of its being perished or destroyed, it may be sold¹. Where it is absolutely necessary for the minor's maintenance, the guardian may sell the minor's immovable property according to the quantum of necessity; but he must not sell immovable property so long as there are movable goods to meet the exigency. If any immovable property is sold while there are movable properties, the sale will not, however, be unlawful².

Law differs if the minor's property is an ancestral one and the deceased ancestor has left no debts or legacies. The guardian may sell, according to the 'ancients',³ the whole of the minor's movable and immovable property for the minor's support and education, but the 'moderns',⁴ maintain that akar or immovable property of a minor can only be sold in the absence of any debts or legacies of the father if, first, the minor has necessity for the price; secondly, the purchaser is willing to pay double its market value; and thirdly, the sale is purely advantageous to the minor, e.g., the property is maintained at a loss, such as tax of the land is greater than its income, or the property is in the danger of being decayed or destroyed. The guardian may also sell the minor's immovable

1 Hedaya, 702.

2 Baillie, Digest Vol. 1, 688.

3 Ibid, 687.

4 Ibid.

property where the necessity arises for the payment of land revenue (khuraj), and the sale proceeds of the minor's goods and chattels are not sufficient to meet the demand of the revenue. Such sale may be either at the actual price of the property or at a little lower, but in no case at such a depreciated price as a man would not accept had it been his own property. Where, however, the deceased father has left debts, unlike Hindu law, the guardian is empowered to sell the whole estate if the debts demand it or as much of it as is necessary for their payment before the minor attains majority. Where the deceased has left legacies, the guardian should not sell more than one-third of the whole property left after the payment of debts; and of the debts and legacies, the former should be paid first, and then the latter. Where the minor has his own property and the guardian contracted debts on his behalf, the debts are to be paid out of the minor's property by the guardian or by the minor himself on attaining majority¹. The guardian must pay the debts of the minor in the presence of witnesses or with the permission of the court; otherwise he will have to account for the payment. He must keep strict accounts of the income and expenditure of the minor's property. The court will not hesitate to remove him for malversation.

Where the minor is in co-tenancy with others, the guardian may sell the share of the minor. He may purchase

1 Hedaya, 639.

anything for the minor at a reasonable price, but not at a very high price¹. He cannot mortgage the minor's property without the leave of the court, nor lawfully give a long lease of the minor's ancestral property for the payment of the minor's debts even. Neither he, nor the minor's father, nor even the court can lend the minor's property². For an obvious benefit of the minor, he may sell the minor's property to himself, or his own to the minor³.

Under Muslim law sometimes an outsider could sell the property belonging to others. He is called fuzuli⁴, i.e., a person who is busy in things not belonging to him, or who acts without authority⁵. A sale by such fuzuli is a dependent one or voidable. It remains with the proprietor either to confirm or dissolve it; but two things are always essential for a fuzuli sale, viz., it must be advantageous to the proprietor and the consent to it must be given when the buyer and seller are both extant. The fuzulis may also act for the minors just as the negotiorum gestores under Roman law; and the minors may be bound by such acts if they are effected with regard to their property and they ratified them after attaining majority.

1 Baillie, Digest Vol. 1, 687.

2 Ibid, 691.

3 Ibid, 692.

4 Hedaya, 296.

5 N.B.E. Baillie, Moohummudan law of Sale (London: 1850), 219 f.n.

6. British Regulations and personal laws on guardianship

The early British Regulations of India, viz., the Bengal Regulation 10 of 1793 and the Madras Regulation 5 of 1804 contained a body of rules regarding guardianship of the person and property of minors. But the Regulations did not cover the guardianship of all the minors. Their application was limited only to those minors who had inherited estates paying revenue immediately to Government¹. Even if those minors had landed estates, whether subject to or exempt from payment of revenue, 'which they acquired by purchase, gift, or by virtue of any other rights, excepting that of inheritance', or where they held jointly with others estates paying revenue to Government, the Regulations did not apply to the guardianship of these properties². The Court of Wards which was constituted by the Board of Revenue on August 20, 1790, assumed guardianship on the death of persons from whom the minors inherited estates. The Regulations with all their limitations attempted for the first time to evolve a common system of law on guardianship acceptable to different communities, specially the Hindus and the Muslims.

The Regulations regarded the guardianship of person and property of a minor as two distinct trusts³, and used

1 Bengal Regulation 10, 1793, sec. 2; Madras Regulation 5, 1804, sec. 2.

2 R. Clarke, Digest of the Regulations and Acts of the Bengal Government from 1793-1854 (London: 1855), section V, Land Revenue, Court of Wards, 204, 205.

3 Bengal Reg. 10, 1793, sec. 6; see also the preamble of the Madras Reg. 5, 1804.

different terminology to denote the holders of these offices. When a person was entrusted with the care of the person, maintenance and education of a minor he was called a guardian, but when one was entrusted with the charge of the minor's property he was called a manager¹. So far as the guardianship of the person of a minor is concerned the Regulations adopted a line closer to Muslim law. Thus unlike Hindu law, the Regulations allowed female relations to have the custody of male minors until they completed the age of five years in Bengal² and seven years in Madras³, and of female minors until they were married or attained majority whichever was earlier⁴. Section 28 of the Bengal Regulation 10 of 1793 fixed the period of minority to be continued with respect to both the Hindus and Muslims until the completion of the fifteenth year⁵ of age in Bengal and eighteenth year in Madras⁶. Both the Regulations required the guardians to educate their wards in a manner 'suitable to their rank and condition in life'⁷

Although sastric Hindu law under the constant pressure⁸ of customs and 'effect of the (pre-British) royal

1 Bengal Reg. 10, 1793, secs. 7, 10, 11; Madras Reg. 5, 1804, secs. 21, 22.

2 Bengal Reg. 10, 1793, sec. 27.

3 Madras Reg. 5, 1804, sec. 21(9).

4 Bengal Reg. 10, 1793, secs. 21, 29; Madras Reg. 5, 1804, sec. 19(4).

5 This was the age under Muslim law when children of both sexes were considered adults. See Baillie, Digest Vol. 1, 4. Under Hindu law there was difference of opinion on this point. See Kane, Dharmasastra Vol. 3, 573.

6 Madras Reg. 5, 1804, secs. 4, 21(5).

7 Bengal Reg. 10, 1793, sec. 29; Madras Reg. 5, 1804, sec. 21(9) and (10).

8 Derrett, Dharmasastra and Juridical Literature (Wisebaden: 1973), 12.

proclamation,'¹ was yielding ground for its own abolition, its rules did not fail to influence subsequent statutory enactments. As regards the union of the guardianship of person and that of property of a minor the Regulations supported Kautilya's views. Section 21 of the Bengal Regulation 10 of 1793 absolutely excluded the legal heirs or other persons interested in 'outliving the ward' from guardianship of the person of a minor, and section 19 of the Madras Regulation 5 of 1804 even excluded from guardianship persons who appeared to have a direct or indirect advantage in the death of the minor. These sections remind us of the following sentence of Blackstone²:

"The law judges it improper to trust the person of an infant in his hands who may by possibility become heir to him".

Although section 8 of the Bengal Regulation 10 of 1793 admitted the claim of the minor's legal heirs and other relations in the management of his property when they were considered fit by the Governor-General in Council, this qualified preference was abolished by section 26 of the Bengal Regulation 7 of 1799. Section 30 of the Bengal Regulation 10 of 1793 uniquely supports Kautilya's views when it provides³:

"The trusts of guardian and manager may be united in persons to whom the inheritance cannot possibly descend, if circumstances should render the same eligible".

1 Derrett, 'Bharuci on royal regulative power in India', in (1964) 84 Journal of the American Oriental Society, 392-95; Kane, Dharmasastra Vol. 1 (Poona: 1968), 569.

2 Commentaries Vol. 1, 461.

3 Sec. 9 of the Madras Reg. 5 of 1804 also gives a similar idea.

The care which a guardian is expected to exercise in the management and preservation of a minor's property is, both under Hindu and Muslim law, that of a bailee. The Regulations demanded a similar amount of care and sometimes even more¹. Under them the managers and the guardians had to deposit security for their office and in case of any breach of trust they would be guilty of embezzlement² and fined with treble amount of what had been misappropriated. The managers had to manage and improve the minors' estates diligently and faithfully and in every respect they should act to the best of their judgment for the benefit of the minors in 'like manner as if the estate were his own'. They were not allowed to grant any lease extending beyond the life of the minor or to dispose of any part of the permanent property under their custody without the sanction of the court³. But the managers and the guardians had to maintain strict accounts of the receipts and expenditures in respect of the minors' estates⁴. Managers were permitted to invest the surplus profits of the estates in purchasing lands or government securities or keeping mortgages⁵.

1 In Hindu law (see Manu VIII. 192; Nar. II. 13; Yajn. II. 66) and in Muslim law (see Baillie, Digest Vol. 1, 690) if a guardian misappropriates the minor's property, he is accountable for an amount equal to that so misappropriated. But under the Regulations it is treble amount.

2 Bengal Reg. 10, 1793, secs. 9, 24; Madras Reg. 5, 1804, secs. 10, 21(1).

3 Bengal Reg. 10, 1793, sec. 16; Madras Reg. 5, 1804, sec. 15.

4 Bengal Reg. 10, 1793, secs. 17, 26; Madras Reg. 5, 1804, secs. 12(3), 21(8).

5 Bengal Reg. 10, 1793, sec. 18; Madras Reg. 5, 1804, sec. 16(1) and (2).

As seen above the Courts of Wards did not assume the guardianship of all the minors. Certain civil courts used to have powers to declare and appoint guardians of the person and property of minors who were not under the superintendence of the Courts of Wards and thereby superseded the rights of natural and testamentary guardians. The Bengal Regulation 5 of 1799 restricted the interference of the zilla courts in such cases and allowed the testamentary guardians or nearest of kin of minors to take charge of the minors' estates without the leave of the courts. But the Bengal Regulation 1 of 1800 soon withdrew the preference given to the next of kin and authorised the zilla judges, where there were no testamentary guardians, to appoint some other persons in lieu of next of kin as guardians. It was held in Oorahee v. Rajbansee Kowur¹ that although the civil courts were vested by the Regulation 1 of 1800 with authority to appoint guardians when considered advisable, they should not in any instance entrust the guardianship of property to the legal heirs of the ward or other person interested in outliving him.

In matters of guardianship of the person and property of Hindu and Muslim minors the civil courts were to follow the respective personal law of the minors² in contradis-

1 (1847) SDA 557, 559 (Beng).

2 Derrett, Religion, Law and the State in India (London: 1968), 234; H.P. Dubey, The Judicial Systems of India (Bombay: 1968), 208; Judicial Establishments Act (Act 142) of 1797, secs. 12, 13.

inction with the Regulations which were applied by the Courts of Wards. Section 17 of the East India Company Act (Act 65) of 1780 provided that where the parties to a suit were Muslims the courts had to apply the laws of the Koran, and where they were Hindus, the laws of the sastra¹. As the European officials who were appointed as judges of the Company's courts had little legal training or knowledge in the Koran and the sastra, they were assisted in the administration of justice by moulvis and pundits². Sir R.K. Wilson observed³:

"Immediate relief to perplexed European judges was afforded by attaching learned Moulvis and Pandits to every court, civil and criminal, whose opinions were in general to be accepted on all points relating to their respective laws".

Thus in the case of Hindu law the pundits who were learned in sastra were consulted by the Anglo-Indian judges and their opinions, known as vyavasthas, were often sought in Hindu cases⁴. And in the case of Muslim law the moulvis who were learned in the Koran and the hadith were consulted. Like the vyavasthas of the pundits in Hindu law, the moulvis used to give fatwas on questions referred to them.

7. British Acts on guardianship

The Bengal Regulation 1 of 1800 which authorised the zilla judges, where there were no testamentary guardians,

1 Dubey, Judicial Systems, 94-95; M.P. Jain, Outlines of Indian Legal History (Delhi: 1952), 115.

2 Derrett, Religion, 233; Jain, Outlines, 132.

3 Anglo-Muhammadan Law (London: 1930), 41.

4 Derrett, Religion, 230, 234.

to appoint guardians to minors not subject to the authority of the Courts of Wards, was repealed by the Bengal Minors Act (Act 40) of 1858. The new Act provided a machinery for the appointment of managers of the estates and guardians of the persons of minors (not being European British subjects) residing in Bengal outside the limits of the original civil jurisdiction of the High Court. Similar provisions were made in Madras by the Madras Regulations 5 of 1804¹ and 10 of 1831², and in Bombay by the Bombay Minors Act (Act 20) of 1864 which was in its contents similar to the Bengal Minors Act of 1858. Under the Bengal as well as the Bombay Minors Act the courts used to grant certificate of administration to the testamentary guardians of minors' estates and in their absence to the minors' willing near relations. The courts could also appoint a certificated guardian to be the guardian of the person of a minor. But such a union of guardianship was purely at the discretion of the court³ and was only permitted in the case of a minor's movable and homestead and structural property⁴, and not in the case of landed estates⁵. Section 10 of the Bombay Minors Act even restricted this discretionary power of the court to unite guardianship of person and property

1 Sec. 20.

2 Sec. 3.

3 Bengal Minors Act, 1858, sec. 7; Bombay Minors Act, 1864, sec. 6.

4 Bengal Minors Act, 1858, sec. 10; Bombay Minors Act, 1864, sec. 11.

5 Bengal Minors Act, 1858, sec. 12.

in a certificated near relative guardian in the case of a Bombay minor's movable and homestead property. The section stated in clear words that a certificated guardian could be entrusted with the guardianship of the person of the minor if and when he was not the "legal heir of the minor, or next in succession to the property". Section 12 of the Bengal Minors Act followed the earlier Regulations of Bengal when it dealt with the guardianship of a minor's landed estates. It provided for the appointment of a manager of the minor's property and a separate guardian for the minor's person 'in the same manner and subject to the same rules in respect of their appointments as if the property and person of the minor were under the supervision of the Court of Wards'. The certificated guardians were expected to exercise the same powers in the management of the minor's estate as a proprietor could have exercised if he were not minor. He could collect and pay all just claims, debts and liabilities due to or by the estate of the minor; but without the leave of the court he could not sell or mortgage any immovable property, or grant lease thereof for a period exceeding five years¹. He had to submit accounts of the property annually. The expenses for the education of minors should be paid out of the profits of the minors' estates with the leave of

¹ Bengal Minors Act, 1858, sec. 18; Bombay Minors Act, 1864, sec. 18.

courts. Both the Acts provided that no guardian should be appointed of the person of a minor whose father was living and no person other than a female should be the guardian of the person of a female¹.

The Minors Acts of Bengal and Bombay did not intend to alter or affect the provisions of Hindu and Muslim law as to guardians who did not avail themselves of the Acts. As seen above they were framed to remove the legislative prohibitions on the jurisdiction of civil courts over the minor's inheritance and to define the position of those who availed themselves of or were brought under the Acts leaving unaffected persons to whom any existing rules of law were applied². In fact the object of the Bengal Minors Act of 1858 and the Bombay Minors Act of 1864 was not to supersede the rights of natural or testamentary guardians of minors' person and property, but to place the testamentary and other certificated guardians under the control and supervision of civil courts³.

8. Guardianship of minors other than Hindu and Muslim

The rights of guardianship of minors other than Hindu and Muslim in British India were determined by dual systems.

1 Bengal Minors Act, 1858, sec. 27; Bombay Minors Act, 1864, sec. 31.

2 Ram Chunder Chuckerbutty v. Brojonath Mazumder (1879) 4 Cal 929 (FB); Kanti Chunder v. Bisheswar (1898) 25 Cal 585, 590 (FB); Sham Das v. Umer Din AIR 1930 Lah 497, 501 (FB).

3 Soonder Narain v. Bennud Ram (1879) 4 Cal 76; Roshan Singh v. Har Kishan (1881) 3 All 535; Bai Kesar v. Bai Ganga (1871) 8 Bom HC Rep 31.

Minors who were living within the Presidency towns of Calcutta, Madras and Bombay were governed by English Common law¹, while those in the mofussil areas were, if they had no customary law of their own, governed by the rules of 'justice, equity and good conscience'². In the appointment of guardians of such minors, as under Common law, the legal powers belonged to the father and only after his death the mother acquired any rights³. Under the English law the father had no right to control the property of his minor children, but the courts of India treated him to be the person 'most likely to guard the interests of his children and would maintain his custody of their property'⁴. He was not permitted to sell or charge

1 Jain, Outlines, 115; Dubey, Judicial Systems, 208-09.

2 P.K. Irani, 'The personal law of the Parsis of India', in J.N.D. Anderson ed., Family law in Asia and Africa (London: 1968), 273-300; Mrs. Meher Rohinton Master Moos, 'The personal law of the Parsees with reference to a proposed Family law Code', in Narmada Khodie ed., Readings in Uniform Civil Code (Bombay: 1975), 116-169, 122; Derrett, Religion, 39-40; Madras Reg. 11 of 1802, sec. 17; Bombay Reg. 4 of 1827, sec. 26; Bengal Reg. 7 of 1832, sec. 9; Stephen v. Hume (1835) Fulton Rep 224, 227; 1 ID 778, 779; Musleah v. Musleah (1844) Fulton Rep 420, 423; 1 ID 894, 896 (OS); Queen v. Bezonji (1843) Perry's Oriental cases, 97; Webbe v. Lester (1865) 2 Bom HC Rep 52, 56; Secretary of State v. Administrator of Bengal (1868) 1 BLR 87; Skinner v. Orde (1871) 14 MIA 309, 323; Mollow v. Court of Wards (1872) 10 BLR 312; In the matter of Saithri (1891) 16 Bom 307, 323; Mithibai v. Limji Nowroji (1881) 5 Bom 506, 523; Philomena Mendoza v. Dara Mistry AIR 1943 Bom 338, 339. On the application of the doctrine of justice, equity and good conscience see Derrett, 'Justice, equity and good conscience', in J.N.D. Anderson ed., Changing law in Developing countries (London: 1963), 114-153.

3 In the matter of Holmes (1862) 1 Hyde 99.

4 Trevelyan, Minors, 60.

his minor children's property without the sanction of the court¹. If it was felt necessary in the interests of the minors to sell or mortgage their property one must apply first to be appointed as guardian and then obtain the court's sanction to the transaction. Trustees for sale of a minor's property could exercise their power to sell independently of the court. An alienation by a guardian which did not bind the minor was not void but voidable at the instance of the minor. Subject to the repayment of the money whose benefit he had obtained, the minor was entitled, before or after attaining his majority, to recover such of his property as went into the hands of other persons by the wrongful or unauthorised act of his guardian². Unlike English law, mother's custody of her minor children's property on the death of their father and in the absence of any testamentary guardian was not considered unlawful³. In the absence of parents or any testamentary guardian no person however nearly related was entitled to the guardianship of the minor's person or property without the leave of the court⁴. But the courts never interfered of its own with a possession not improperly obtained or not prejudicial to the welfare and interests of a minor⁵.

1 Trevelyan, Minors, 167.

2 See Specific Relief Act (Act 1) of 1877, sec. 41; Planche v. Colburn (1831) 8 Bing 14, 16; 131 ER 305, 306; Simpson v. Lamb (1856) 17 C B 603; 139 ER 1213; Prickett v. Badger (1856) 1 C B 296 (NS); 140 ER 123; Taleb Hossain v. Ameer Bux (1874) 22 WR 529 (CR).

3 Trevelyan, Minors, 60.

4 Ibid, 60.

5 Ex parte Intiazoon Nissa Begum (1814) 2 Strange's Notes on cases, 109; 5 ID 289 (OS); In re Joshy Assam (1895) 23 Cal 290.

In 1874 the European British Minors Act (Act 13) was passed for appointing guardians of European British minors in those parts of India to which the jurisdiction of the chartered High Courts did not extend. The Act declared the power of a father to appoint by will or other instrument a guardian of his legitimate children, and that of the mother in the absence of the father or any testamentary guardian appointed by him. The courts could on application appoint a guardian of the person or property or both of a minor where a testamentary guardian was found insufficient¹. It was for the first time² that any legislation regarding the minors contained a provision that in appointing a guardian the courts should be guided by what appeared to be for the "best interest of the minor in respect to his temporal and his mental and moral welfare", and should also consider the bearing of the following circumstances upon the guardianship of person or of property: (1) nearness of relationship; (2) wishes of the deceased parent; and (3) any existing or previous connection of the proposed guardian with the minor's person or property³. Although the terminological difference between the guardianship of the person and of property of a minor

1 European British Minors Act, 1874, sec. 4.

2 Virtually, the earlier Regulations and Acts were more for the preservation of minors' properties for revenue purposes than for their physical or mental welfare.

3 European British Minors Act, 1874, sec. 10.

which was being maintained in the earlier Regulations and Acts was not expressly stated in the provisions of the Act, the apprehension of the ill effects of their union in one individual could be presumed from the wording of section 10. The Act recognised the natural guardianship of parents. As long as the father was alive he had the custody of the person and property of his minor children. On his death the mother could assume the guardianship of their person and property. Either parent could, however, appoint a testamentary guardian. Similar to the guardians appointed by the chartered High Courts, under this Act the guardians of person were charged with the custody of the minors and they were to look to the minors' support, health and education¹. For the maintenance, education or advancement the courts could order the principal of the wards' property or any part thereof to be disposed of². The guardians of property were to keep safely the minors' property, and in the case of immovable property they should not suffer any waste, and should maintain the building and their appurtenances out of the rents and profits of the property. They could make leases for any term not exceeding a year of immovable property or any part thereof, but with the sanction of the court they could grant leases for such period of time and on such rents and conditions as were approved by the court³. In the maintenance and

1 European British Minors Act, 1874, sec. 11.

2 Ibid, sec. 17.

3 Ibid, sec. 16.

administration of minors' property the responsibility of a guardian was that of a bailee, he was responsible for any loss occasioned to the property by his wilful default or gross negligence¹. They had to give security for their office and submit accounts.

9. Consolidation of statutory guardianship law in British India

In 1890 the Guardians and Wards Act (Act 8) was passed to consolidate and amend the law relating to guardians and wards. This Act aims at providing a law on the subject applicable as far as possible to all classes of people in British India; all the earlier enactments regarding minors' guardianship were repealed. But it does not thereby alter the application of Hindu and Muslim law to the selection of a guardian and the administration of the property of a minor belonging to any of the Hindu and Muslim communities², nor does it affect the jurisdiction and authority of Courts of Wards³. In respect of the application of personal laws of the minors, the law remains the same as it existed in the Bengal Minors Act of 1858 and the Bombay Minors Act of 1864. As seen earlier in those Acts there was no indication of any intention to alter any provisions of Hindu or Muslim law as to guardians who did not avail themselves of those

1 European British Minors Act, 1874, sec. 18(c).

2 See Report of the Select Committee on the Guardians and Wards Bill, 1890, in the Gazette of India, 1890, part V 77; see also secs. 6 and 7, Guardians and Wards Act, 1890.

3 GWA, 1890, sec. 3.

Acts. Therefore a lawful or natural guardian is not compelled by this Act to obtain the court's permission before dealing with the property of a minor. A guardian may, if permitted under the personal law of the minor, deal with the minor's property without obtaining a certificate of guardianship.

The father is recognised as the paramount guardian of the person of his minor children, and the court is not permitted to make an order declaring a guardian of the person of a minor during the lifetime of his father unless in the opinion of the court the father is unfit to be his guardian¹. Unlike the European British Minors Act of 1874 this Act does not expressly mention the mother to be the guardian of her minor children if the father dies without appointing any testamentary guardian². But the courts cannot ignore her rights as it must be guided in appointing or declaring the guardian of a minor 'by what appears to be for the welfare of the minor according to the personal law of the minor'³. Thus under Hindu law the mother assumes guardianship of the person and property of her minor children when the father is dead, and under Muslim law although she is not allowed the guardianship of her minor children's property, she is entitled to the custody of a male child upto the end of his seventh year and a female child till she arrives at puberty.

1 GWA, 1890, sec. 19(b).

2 European British Minors Act, 1874, sec. 3.

3 GWA, 1890, sec. 17(1).

Similarly to the European British Minors Act of 1874, this Act uses the term 'guardian' to refer to both person and property guardian. Unlike the provisions of the Bombay Minors Act of 1864 this Act does not clearly prohibit the union of guardianship of person and property in any legal heir of the minor or any person 'next in succession to the minor's property'¹. For the omission of this prohibition it is stated in the Statement of Objects and Reasons of the Guardians and Wards Bill² that it was the opinion of the Legislative Council when the Guardians and Wards Bill was being considered by them that it should be dropped. It is to be noticed that although they preferred not to put any restriction on the appointment of legal heirs or any person next in succession to the property of a minor as guardian of a minor's person, they did not thereby encourage a view contrary to that of Kautilya or Blackstone. To show the reason why they recommended removal of the prohibition, the Chairman who moved the motion and with whom other members of the Council agreed, cited the following example of a widowed mother whom a deceased Hindu father left with a minor son³:

"If the son died during his minority, of course the property inherited by him from his father would pass to his mother; but that was no reason why the mother should be deprived of the guardianship of her child while he lived".

1 Bombay Minors Act, 1864, sec. 10.

2 The Gazette of India, 1886, part IV, 77. See para 13 of the Statement of Objects and Reasons of the Bill.

3 Proceedings of the Legislative Council of India, 1858 Vol. 4, 576-77.

Neither Kautilya nor Blackstone would oppose a union of guardianship of person and property in a parent who is capable of managing the minor's property, but as soon as it is united in an heir or a person other than a parent their objection applies. Perhaps what prompted the members of the Legislative Council to hold such a view was section 10 of the Bombay Minors Act of 1864 which contained the following proviso:

"Provided that in the case of minors who have inherited property by adoption, the natural father may be appointed guardian".

They might have the conviction that had the prohibition been contained in the Act it would have excluded even the parents which was actually not true¹.

Under this Act the courts may not distrust an heir (merely because he is an heir) as guardian of a minor's property, but they rightly apprehend danger to put the custody of the minor under him at the same time. Reid, J., observed²:

"There is no obvious danger to property when it is managed by the heir, whatever danger there may be to a child in the guardianship of the person who would profit by his death".

Courts must not neglect to consider the effects of a union of guardianship in a legal heir or a person having a chance of succession of the minor's property specially when such heir or person is someone else other than a parent.

1 Bengal Minors Act, 1858, sec. 27; Bombay Minors Act, 1864, secs. 6, 31.

2 Amin Chand v. Phagu Mal (1898) 33 PR 181, 182.

If the sections 8(b), 17(2) and 39(g) of the GWA are read together it would show that for the welfare of a minor having landed property it is always advisable not to put the custody of his person and property in any of his relations having an 'adverse interest' in that property. Under the provisions of its section 17(1) the Act provides:

"In appointing or declaring the guardian of a minor, the court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor".

The welfare of the minor is the prime consideration in the appointment of a guardian, and a stranger may be appointed a guardian of the person of a minor in preference to a relation if the court considers that the welfare of the minor demands it¹. It is the minor's welfare and not the rights of his prospective guardian which should be weighed in the appointment of a guardian; and in ensuring this welfare the courts are expected to make the appointment as much in consistence with the personal law of the minor as the circumstances of the case allow. The consideration of the personal law must be subordinate to the minor's welfare and its importance would be in proportion to its bearing upon the minor's welfare.

The earlier Acts on guardianship did not specify the nature of the relationship between a guardian and a ward;

1 Batcha Chetty v. Ponnusawmy Chetty (1912) 22 MLJ 68, 72; Narasayya v. Venkatappa AIR 1923 Mad 359.

it was often assumed to be that of a trustee and a cestui que trust. Section 20 of this Act states clearly that 'a guardian stands in a fiduciary relation to his ward' --- a relation uberrimae fidei¹ which lasts even after the function of guardianship itself has ceased to exist. The liability of a guardian is that of a trustee² and for the abuse of or for negligence or incapacity to perform the duties of this trust he may, as under section 22(a) to (e) of the European British Minors Act of 1874, be removed³. The guardian of the person of a minor has a right to the custody of the person of his ward, and he must look to the minor's support, health and education, and such other matters as are agreeable to the personal law of the minor⁴. The Bengal Minors Act of 1858 and the Bombay Minors Act of 1864 provided in sections 27 and 31 respectively that nothing in those Acts should authorise the appointment of any person other than a female as the guardian of the person of a female⁵. This Act has adopted a liberal attitude in this regard; there is nothing in it to prevent a male from being appointed as the guardian of the person of a female.

The Act has not said in so many words that the dealings with a minor's property by his guardian should be controlled

1 The Gazette of India, 1886, part IV, 77. See para 13 of the Statement of Objects and Reasons of the Bill.

2 GWA, 1890, sec. 37

3 Ibid, sec. 39.

4 Ibid, sec. 24.

5 Fuseehun v. Kajo (1884) 10 Cal 15.

by the personal law of the minor. Section 27 of the Act provides:

"A guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own, and, subject to the provisions of this chapter, he may do all acts which are reasonable and proper for the realisation, protection or benefit of the property".

It appears from the literal wording of the section that it applies to all property guardians whether recognised by personal laws or certificated by courts¹. This is not necessarily the correct conclusion at which to arrive, but the Hindu Minority and Guardianship Act (Act 32) of 1956, as we shall see², took up the wording of section 27 and no one has commented (as they well might) that any novelty was enacted thereby: all guardians, natural, testamentary, or certificated are expected in the exercise of their powers to deal with minors' property as carefully as a man of ordinary prudence would deal with it if it were his own property, and they are also allowed to do all acts which are reasonable and proper for the realisation, protection or benefit of the minor's estate³.

Without the prior permission of the court persons who are appointed or declared to be guardians of the property of minors are not permitted (a) to mortgage or charge, or transfer by sale, gift, exchange or otherwise,

1 Dawsons Bank, Ltd. v. Ma May AIR 1934 Rang 335, 336.

2 See infra, 244-45.

3 Derrett, Introduction, 72 para 88.

any part of the minor's immovable property, or (b) to lease any part of that property for a term exceeding five years or for any term exceeding more than one year beyond the date on which the ward ceases to be a minor¹. The court may grant the above permission only 'in case of necessity or for an evident advantage to the ward'². If an alienation is made without the court's permission or in excess of the powers given under a will or other instrument that will not be void, but only voidable at the instance of the affected person³. As under the previous Acts, the court may require a guardian to furnish securities, submit accounts⁴, and to apply for the maintenance and education of the minor and his dependants, and also for the celebration of ceremonies to which the minor or his dependants may be a party⁵.

10. Modern law of guardianship

10.1. India

Section 18(3) of the Indian Independence Act of 1947 provided that the law of British India as existing before the 15th of August, 1947, "shall, with necessary adaptations,

1 GWA, 1890, sec. 29. This section combines in itself the contents of section 16 of the Bengal Minors Act of 1858, section 20 of the Bombay Minors Act of 1864 and section 13 of European British Minors Act of 1874.

2 GWA, 1890, sec. 31.

3 GWA, 1890, sec. 30.

4 Shamrao v. Shashikant AIR 1948 Bom 15, 19.

5 GWA, 1890, sec. 34.

continue as the law of the new Dominion ... until other provision is made by Legislature". After the Independence the law relating to the guardianship of a minor's person and property in India continued to be as before. The GWA, 1890, was adopted¹ and cases were and are decided according to its provisions even after August 25, 1956, when the Hindu Minority and Guardianship Act was passed to amend and codify the law relating to minority and guardianship among the Hindus in matters of a minor's person or property other than his undivided interest in joint family property which is specifically excluded from the scope and purview of the Act². The provisions of the new Act are complementary to those of the GWA of 1890³, but in case of any repugnancy the provisions of the new Act will prevail⁴. This Act has fixed the age of majority at the completion of eighteen years of age instead of twenty-one years⁵. Under this Act a person cannot claim to be the legal guardian of a Hindu minor unless he or she is (i) a natural guardian, (ii) a guardian appointed by the will of the minor's father or mother, (iii) a guardian appointed or declared by a court, or (iv) a person empowered to act as such by or under any enactment relating to any Court of Wards⁶.

1 Adaptation of Existing Laws Order, 1947, sec. 3 (with effect from 15 August, 1947). See also Art 372 of the Constitution of India, 1950.

2 HMGA, 1956, sec. 12. See also In re Krishnakant AIR 1961 Guj 68, 71-72.

3 HMGA, 1956, sec. 2.

4 Ibid, sec. 5.

5 Ibid, sec. 4(a).

6 Ibid, sec. 4(b). See also Ramchandra Iyer v. Annapurni (1963) 1 Ker 656; (1963) KLT 348.

The HMGA has expressly recognised the father and after him the mother as the natural guardian¹ of the person and separate property of a minor, and it does not seem that section 13(2) has, in any way, affected their rights. So far as the power of disposition of a minor's property is concerned the natural guardians are placed at par with certificated guardians. Section 8(1) defines the general powers of a natural guardian in terms similar to those which could be found in section 27 of the GWA, but section 8(2) has made it obligatory upon him to obtain the previous permission of the court for an alienation of a minor's immovable property as it is required for a guardian appointed by the court under section 29 of the GWA. The remaining sub-sections of section 8 contain provisions similar to those of section 30 and 31 of the GWA. Sub-section (1) of section 8 also contains in it the ratio of the Privy Council decision in Waghela Rajsanji v. Masludin². But the most spectacular of all is section 11 of the HMGA which is said to have taken away the powers of a de facto guardian to dispose of or deal with the property of a Hindu minor.

Under Hindu law the powers of a de facto guardian to bind a minor's estate by alienations of the latter's immovable property in the case of necessity or for the benefit of the estate of the minor have been recognised since the Privy Council decision in Hunoomanpersaud Panday v. Mussumat Babooee³ in 1856. But, as we shall see in chapter 3,

1 HMGA, 1956, secs. 6 and 9.

2 (1887) 14 IA 89 (PC).

3 (1856) 6 MIA 393 (PC).

if the section is carefully read it will appear that the whole section seems to indicate that a person cannot validly dispose of a minor's property merely for his being a de facto guardian, i.e., unless the alienation is supported by some other considerations which the Parliament may appear to think to have been contained in the Privy Council decisions in Hunoomanpersaud's and Waghela Rajsanji's case. In India the guardians and minors of other communities are still governed by the GWA as before, so far as its provisions are consistent with the personal laws, if any, of the minors of those communities.

10.2. Pakistan

After Independence Pakistan adopted the GWA in 1949¹ and extended it to the whole of Pakistan in 1955². Before such extension it was applied to the Phulera in the Excluded Area of Upper Tanawal to the extent the Act was applicable in the North-West Frontier Province³ and was also extended

1 Adaptation Order, 1949, Arts. 3(2) and 4 (see the Gazette of Pakistan, 29 April, 1949); and the Federal Laws (Review and Declaration) Act (Act 26) of 1951, sec. 8 (see the Gazette of Pakistan, 12 May, 1951).

2 Central Laws (Statute Reform) Ordinance, 1960 (21 of 1960) sec. 3 and Second Schedule (with effect from 14 October, 1955), (see the Gazette of Pakistan, 9 June, 1960); see also Art 224 of the Constitution of the Islamic Republic of Pakistan, 1956; Art 225 of the Constitution of the Republic of Pakistan, 1962; and Art 268 of the Constitution of the Islamic Republic of Pakistan, 1973.

3 North-West Frontier Province (Upper Tanawal Excluded Area) Laws Regulation, 1950.

to the Leased Areas of Baluchistan¹, to the Baluchistan States Union², and to the Khairpur state³. In 1958 it was enforced in Gwadur⁴. As stated earlier the GWA does not interfere with the personal laws of the Hindus and Muslims. The persons who are entitled to act as natural guardian under Hindu and Muslim law continue to be recognised as such guardians. It confers expressly a certain jurisdiction and defines the position of those who avail themselves of it, leaving persons to whom any other rules of personal law apply unaffected. Unlike the HMGA of India no attempt was made in Pakistan to codify the customary laws of the Hindus relating to minority and guardianship. The position of de facto guardians is not therefore shaken in any way in Pakistan and no limitation is imposed on their powers to bind the minors' estates by alienation of immovable property for the necessity or benefit of the minors. Pakistan courts are following the GWA supplemented by the personal laws of minors as long as its provisions are consistent with their welfare.

1 Leased Areas (Laws) Order, 1950 (Governor-General's Order 3 of 1950), see the Gazette of Pakistan, 5 October, 1950.

2 Baluchistan States Union (Federal Laws) (Extension) Order, 1953 (Governor-General's Order 4 of 1953), see the Gazette of Pakistan, 15 April, 1953.

3 Khairpur (Federal Laws) (Extension) Order, 1953; see the Gazette of Pakistan, 15 April, 1953.

4 Gwadur (Application of Central Laws) Ordinance (37 of 1960), 1960, sec. 2 (with effect from 8 September, 1958), see the Gazette of Pakistan, Extraordinary, 31 August, 1960.

10.3. Bangladesh

The GWA has been adopted in Bangladesh¹, and, as in Pakistan, no other enactment is made to amend or supplement its provisions. The GWA does not interfere with the rules of personal laws. Thus persons who are entitled to act as natural guardians under Hindu and Muslim law continue to be so recognised. Although the provisions of the GWA do not contain anything against the union of the guardianship of person and of property in the same individual, a presumptive heir to the property of a minor is not considered a suitable person to be appointed guardian of his person, because such a person stands to gain by the minor's death². In India under the HMGA the Hindu natural guardians are to seek prior permission of the court if they want to dispose of their minor children's property, but in Bangladesh they are allowed to do it to the extent permitted by the customary Hindu law. The courts in Bangladesh recognise the father's absolute right to appoint a testamentary ^{guardian} but it is not so recognised in the case of a mother; while in India the HMGA has placed both the parents in an equal position in this respect³.

1 Art. 149 of the Constitution of the Peoples Republic of Bangladesh, 1972; Act 8 of 1973.

2 Sami Row v. Elivatha Row (1906) 16 MLJ 357; Krishnaswami Chetty v. Collah Mangammah (1911) 1 MWN 365; Sharfan v. Bholi AIR 1922 Lah 395, 396.

3 HMGA, 1956, sec. 9.

C H A P T E R I I

ALIENATION BY NATURAL GUARDIANS UNDER HINDU LAW

1. Alienation

In the previous chapter we have seen that in all the systems minors are incapable of entering into transactions in respect of their own property; and their guardians may alienate their property under certain circumstances on their behalf. Generally, in guardianship alienations are made for the purpose of either raising funds to meet necessity, or to pay some ancestral or other validly incurred debts, or to pay government revenue, or to improve the estate of the minor, or to purchase more profitable or income-bearing properties, or to start some business in expectation of attractive returns, or to convert immovable properties into cash for lending out at a high rate of interest, or for other transactions of a similar nature; and they are effected by sale, mortgage, lease, gift, exchange or other similar actions.

1.1. Who are natural guardians under Hindu law?

Under every system of law the father is the natural guardian of his minor children; but as regards others the position varies according to the personal law of the minor. Under Hindu law the parents are the natural guardians¹ of

1 Derrett, Introduction, 50 para 51.

their minor children, and among them the father has the preferential right¹ over the mother to the guardianship of both the person and property of the minors. But as regards the claim of other relations to guardianship sometime it was said on the basis of the following authorities of Strange and Macnaghten that paternal and maternal relations were also natural guardians. Strange observed²:

"The natural guardians of a minor are, first his father, then his mother, elder brother, paternal relatives and maternal relatives".

Macnaghten said³:

"A father is recognised as the legal guardian of his children, when he exists; and when the father is dead the mother may assume the guardianship. In default of her, an elder brother of a minor is competent to assume the guardianship of him. In default of such brother, the paternal relations generally are entitled to hold the office of guardian and failing such relatives, the office devolves on the maternal kinsmen, according to their degree of proximity; but the appointment of guardians universally rests with the ruling power".

Referring to the above passage from Macnaghten, Garth, C.J., observed in Kristo Kissor Neoghy v. Kadermoye Dossee⁴:

"We do not think that this passage means that all persons therein mentioned have in turn an absolute right to take upon themselves the guardianship of a minor, without any permission or authority from the ruling power. If it did mean this, the authorities cited would not appear to support it".

1 In the matter of Himnauth Bose (1862) 1 Hyde 111; Mokoond Lal v. Nabodip Chunder (1898) 25 Cal 881, 884.

2 Hindu Law Vol. 1 (Madras: 4th ed., 1864), 72a.

3 Hindu law Vol. 1, 103-04.

4 (1978) 2 CLR 583.

The learned Chief Justice observed that no one else in a minor's family other than his parents was entitled as of right to act as the minor's natural guardian; the right to act after the parents depended upon the decision of the king. A Full Bench of the Madras High Court in Chennappa v. Onkarappa¹ did not approve of the above two passages of Strange and Macnaghten. In his leading judgment of the Full Bench Leach, C.J., observed²:

"It is common ground that the ancient texts of Hindu law do not provide for the management of a minor's property beyond stating that the guardianship shall rest with the king. The position of the king is now taken by the court. Custom has, however, recognized that the father of a Hindu minor, and on his death the minor's mother, is entitled to the guardianship of the minor's estate. This has been accepted from time immemorial so universally that the right of the father or of the mother as the case may be cannot now be disputed, but it appears to be equally clear that custom has not extended that rule beyond mother".

Krishnaswami Ayyangar, J., another member of the Full Bench rightly thought³ that the enumeration of other relations besides the parents in the list of natural guardians by Strange and Macnaghten was not intended to declare the persons to be recognised as lawful guardians under Hindu law without reference to an appointment by the court; on the contrary, it was an indication of the order of preference which the court should bear in mind in the making of choice of a guardian from among the available relations,

1 (1940) Mad 358 (FB).

2 Ibid, 363-64.

3 Ibid, 371.

the dominant consideration being always the welfare of the minor. Under Hindu law the father and after his death the mother are the natural guardians of their minor children¹; on the adoption of a minor child the natural parents lose their right of natural guardianship over the child, and their place is taken by the child's adoptive parents; and on the marriage of a minor daughter her husband becomes her natural guardian.

The personal law of guardianship of the Hindus in India has now been codified by the HMGA of 1956. Sections 6 and 7 of that Act denote the persons entitled to act as natural guardians of a Hindu minor². According to them the father and after him the mother are the natural guardians of a legitimate boy or unmarried girl; and in the case of an illegitimate boy or unmarried girl the mother and after her the father are the natural guardians. In the case of a married minor girl her husband will be her natural guardian. Section 13(2) of the Act provides that no person shall be entitled to be appointed as guardian by the court by virtue of the provisions of this Act or any law relating to guardianship in marriage among the Hindus, if the court is of opinion that his guardianship will not be for the welfare of the minor. As it stands, although the

1 Annapurnamma v. Ramanjaneyaratnam AIR 1959 AP 40, 46; Jamuna Prasad v. Mst. Panna AIR 1960 All 285, 287; Sheokumar v. Shiv Rani Bai AIR 1966 MP 189; In re Dakshinamurthi Mudaliar (1969) 1 MLJ 345.

2 For a fuller discussion of these sections see Derrett, Introduction, 52 para 54; S.V. Gupte, Hindu law of Adoption, Maintenance, Minority and Guardianship (Bombay: 1970), 401-406.

father and mother are the natural guardians under the Act, the court can ignore their claims if it is of opinion that his or her guardianship will not be for the minor's welfare.

1.2. Alienation by natural guardians and Hunoomanpersaud's case

The circumstances under which a guardian or manager¹ of the estate of a Hindu minor can alienate his ward's property were clearly defined by Knight Bruce, L.J., in Hunoomanpersaud's case. The principles of that case apply equally to all guardians of Hindu minors, excepting those who are appointed by courts or whose powers are defined by testamentary instruments appointing them. The facts of the case show that a mother mortgaged the estate of her minor son as manager of the estate for the payment of government revenue and also some ancestral debts of the minor. Several propositions were laid down by that decision. The first one was that "under the Hindoo law, the right of a bona fide incumbrancer who has taken from a de facto Manager a charge on lands created honestly, for the purpose of saving the estate, or for the benefit of the estate,

¹ It is to be observed that under the earlier British Regulations and Acts, specially the Bengal Regulation 10 of 1793, the Madras Regulation 5 of 1804, the Bengal Minors Act of 1858, and the Bombay Minors Act of 1864, and also in the cases decided under those Regulations and Acts the person who was entrusted with the custody of a minor's person was called his guardian, while one who was entrusted with the custody of the minor's property was called his manager. This terminological difference was first removed by the European British Minors Act of 1874 and then by the GWA of 1890.

is not (provided the circumstances would support the charge had it emanated from a de facto and de jure manager) affected by the want of union of the de facto with the de jure title"¹. The second one was that the power of a manager to charge his minor ward's estate "is, under the Hindoo law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate"². The last one was that "the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance for the benefit of the estate"³. It was also observed that if a purchaser so inquired and acted honestly 'the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge', and 'under such circumstances' he is not bound 'to see to the application of the money'.

Although the language in which the propositions are put by their Lordships of the Privy Council leads us to believe that they were there in the Hindu law from before, but, in fact, they are completely alien to that system⁴.

1 Hunoomanpersaud's case (1856) 6 MIA 393, 412-13 (PC).

2 Ibid, 423.

3 Ibid, 424.

4 Derrett has very logically traced out the genesis of these principles under the title 'The Misty Origins of Anglo-Hindu law', in Appendix II of his Critique to Modern Hindu Law, 425-432.

Of the three propositions, the third is the corollary of the first one; and they are taken out of the 'English law of trusts as it was before 1925',¹. Such rules were not there in the 'Hindu scriptures or commentaries',². So far as the second proposition is concerned the power given under it to the manager of a minor's estate is an import from the Roman law which found its way through the Chancery and the Privy Council into Hindu law³. Although this power is limited and qualified one, it was derived neither from Hindu law nor from English law so far as the payment of ancestral debts is concerned. We have seen earlier that under the sastric Hindu law minors were not liable for ancestral debts until they reached majority, and the guardians had no power to alienate the minors' property for their payment without the court's permission. Similarly under English law the creditors could not force the minors to pay ancestral debts as long as they were under age⁴; and the guardians were not allowed to create charges over their minor wards' landed property⁵.

1 Derrett, Introduction, 427 para 542. See also Derrett, 'Justice, equity and good conscience', in J.N.D. Anderson ed., Changing law in the Developing Countries (London: 1963), 114-153.

2 Derrett, Critique, 427.

3 Ibid, 429-431. See also Derrett, 'The role of Roman law and Continental laws in India', in (1959) 24 Zeitschrift fuer anslaendisches und internationales privatrecht, 657-685.

4 Pollock and Maitland, History of English law Vol. 2, 441, f.n. 4.

5 Derrett, Critique, 428; J. Story, Equity Jurisprudence (London: 14th ed., 1918), sec. 1357.

In Hunoomanpersaud's case their Lordships of the Privy Council observed¹:

"Though an estate be ancestral, it may be charged for some purposes against the heir, for the father's debt, by the father, ... Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it, even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindoo law, the freedom of the son from the obligation to discharge the father's debt, has respect to the nature of the debt, and not to the nature of the estate, whether ancestral or acquired by the creator of the debt".

The first portion of the above observation is well according to Hindu law, if the debt is paid by the father during his lifetime out of the joint family property. A minor would be bound by the payment of an ancestral debt or a debt contracted by his father and not affected by illegality or immorality when it is paid by the father before partition either from the ancestral or the father's self acquired property². It is on this account that this Privy Council decision was followed by their Lordships in Girdharee Lal v. Muddun Thakoor³. But the second portion of the observation is not in accordance with sastric Hindu law. If a partition is effected and the property is vested in a minor, or if the father is dead, the sastric texts provide that the minor is not required to pay his ancestral

1 (1856) 6 MIA 393, 421.

2 Mussomut Junuk Kishoree v. Raghoonundan Sing (1861) SDA 213, 222 (Beng); Sadabart Prasad v. Foolbash Koer (1869) 3 BLR 31 (FB).

3 (1874) 14 BLR 187 (PC).

debts until he attains majority, or where the father or manager who incurred the debts is living abroad, until the expiration of twenty years from the date of their leaving the country. Consequently, under sastric law there is no legal necessity for the payment of a minor's ancestral debts during his minority. Therefore, a guardian cannot alienate the minor's property for such debts. In Hunoomanpersaud's case when their Lordships held the mortgage bond executed by the mother-guardian during the minority of her son for the payment of the latter's ancestral debts as binding on the minor's estate, the decision does not seem to be according to the sastric texts of Hindu law. Their Lordships, per Lord Atkinson, did not notice this point in Palaniappa Chetty v. Devasikamony¹ where in explaining the meaning of the terms 'necessity' and 'benefit of estate' Hunoomanpersaud's case was thoroughly discussed. This escape is probably due to their Lordships' assumption that the liability for the payment of a Hindu minor's ancestral debts is an unqualified one.

The decision in Hunoomanpersaud's case which is the acknowledged basis of the powers of a guardian or manager of a minor's estate, is said to have been based on the texts of the Mitakshara. Their Lordships of the Privy Council, per Sir Dinshah Mulla, observed in the Benares

¹ AIR 1917 PC 33, 36.

Bank Ltd. v. Hari Narain¹:

"The power of a manager of a joint family governed by the Mitakshara law to alienate immovable property belonging to the family is defined in verses 27 to 29, ch. 1 of the Mitakshara. The judgment of this court in Hunoomanpersaud Pandey v. Mt. Babooee Koonweree, ... was founded apparently on those verses".

We have seen earlier that these verses of the Mitakshara provide that in a Mitakshara joint family property the right of ownership originates by birth and all the coparceners have equal interests in the joint family property, and further that none of the coparceners can effect any alienation of the joint family property without the consent of other coparceners². An exception to this general rule of incapacity has been introduced by relying upon the text of Brihaspati in cases where the coparceners cannot give their consent because of their being minors. In his gloss on this text Vijñanesvara says that the transfer would be justified if a calamity affecting the whole family, i.e. in apatkale, requires it, or the support of the family, i.e., for kutumbarthe, renders it, or indispensable duties, such as the obsequies of the father or the like, i.e., dharmarthe, make it unavoidable³.

It appears from the context in which Vijñanesvara used the text of Brihaspati and the gloss thereon that the text of Brihaspati relates to the disposition of such

1 AIR 1932 PC 182, 185.

2 Mitakshara 1.1.27.

3 Ibid, 1.1.29. See also Strange, Hindu law Vol. 1, 19-20; Paras Diwan, Modern Hindu Law (Allahabad: 2nd ed., 1974), 274.

undivided immovable property as awaits partition at the hands of those who are entitled to it and as, before such partition, is in the management of an adult member of the family who has a distinct share in it jointly with the minor members of the family¹. If the Privy Council decision is considered in this light it would appear that their Lordships strangely relied upon the Mitakshara verses in Hunoomanpersaud's case in which the mother-alienor had absolutely no interest whatsoever in the property transferred except her supervisory capacity over it as guardian of her minor son in whom all the interest in the property vested. In so far as it is concerned with the transfer of a minor's property by his guardian, the Privy Council ruling is not based on the Mitakshara texts. Although lawyers, judges and text-book writers² unwisely trace the origin of the alienating power of a guardian to the above mentioned verses of the Mitakshara, their Lordships of the Privy Council imported Roman law principle in this respect because of their training in that law³. The Privy Council in fact introduced the Roman negotiorum gestio into Hindu law, under which the negotiorum gestor, i.e., a stranger could validly transfer the property of others without their concurrence but for their benefit or advantage. It is to be mentioned here that even under Hindu law a stranger or

1 Budhkaran Chaukhani v. Thakur Prosad AIR 1942 Cal 311, 317. per Pal, J.

2 Excepting J.D.M. Derrett who for the first time pointed out the non-Hindu basis of the Privy Council ruling. (See his Critique, 425-431).

3 Derrett, Critique, 429-431.

a person attached to the family may alienate the property of others or of that family under certain emergent circumstances, but, as we shall see in chapter 3, the Privy Council did not consider in Hunoomanpersaud's case those circumstances and the texts and authorities providing that power.

In spite of its non-Hindu origin the Privy Council ruling worked very well for over a century and a quarter¹. Ever since this Privy Council decision both the Bench and the Bar regard its ruling as applicable to all circumstances of alienation. Paradoxically enough, after this Privy Council decision some of the learned judges² seek to find justification for the alienation of a joint undivided family property by the manager of that family consisting of minor members as well, in the above Privy Council ruling while that authority of the manager is there in full force in the verses of the Mitakshara. Unless the manager is a stranger which is unlikely such reference seems to disown the manager's own interest in the joint family property.

Nobody excepting a 20th century orientalist³ ever bothered about the quiet replacing of a sastric rule by a

1 Derrett, Critique, 425-432. See also Tulsidas v. Raisingji AIR 1933 Bom 15, 20 (FB) per Patkar, J.

2 Judges of the Full Bench in Jagat Narain v. Mathura Das AIR 1928 All 454 (FB).

3 J.D.M. Derrett, Professor of Oriental laws in the University of London. In early 50s of this century he was Tagore Professor of Law in the University of Calcutta. His
(contd.)

foreign non-Hindu principle¹. However, the principles of the Privy Council decision have become the accepted basis of the powers of a guardian, natural or de facto. As seen earlier the Privy Council decision shows that the manager or guardian of a minor's estate can exercise his power to charge or alienate the minor's estate either on the ground of necessity or for the benefit of the estate. The two words 'necessity' and 'benefit' indicate, if they are looked at in the perspective in which they are pronounced by their Lordships of the Privy Council in Hunoomanpersaud's case, two distinct concepts --- one relating to the personal affairs of the minor, and the other relating to his property. Now the question arises what necessity of a minor or what benefit of his estate will, under Hindu law, justify an alienation of a minor's property?

1.2.1. Meaning of necessity

It is very difficult to give a precise definition of the term 'necessity' or to enumerate the necessities which may bind a minor's estate. There may be a necessity for the necessities of a minor, or for the payment of debts validly incurred by a guardian for the minor, or for making a gift to any member of the minor's family or for any

(contd) assessment of sastric literature [See Derrett, Dharmasastra and Juridical Literature (Wisebaden: 1973)] and his recent translation of Bharuci's Commentary on the Manusmrti (Wisebaden: 1975) speak of his knowledge of the language in which all the Hindu Dharmasastras are written.

1 It is amazing that the origin of the principle, so adroitly phrased, escaped the notice of the Bench and the Bar for over a century.

religious purpose. But necessity does not mean actual compulsion; it implies a kind of pressure which the law recognises as serious and sufficient¹. The actual occasion for necessity must arise. A mere anticipated want does not constitute a justifying necessity; and to justify an alienation of a minor's property it must be shown that the expenses could not have been met from the income of the property in the hands of the guardian, and that they were not unreasonable. Indeed necessity is to be understood strictly with reference to the minor's own contemporary objective need²; mere requirement of an ordinary kind, or mere fulfilment of a wish felt by the guardian in relation to a minor's estate will not constitute a necessity³. Necessity is the touchstone of a guardian's authority to alienate his minor ward's property. Broadly speaking necessity will include all those things which are deemed necessary for the minor and his dependants. Again, all necessities may not always be necessaries, but the minors are liable for necessaries, and not merely for necessities⁴.

1.2.1.1. Necessity for necessaries

Certain things are necessaries, such as food, clothing, medicine, etc., but at times because of their quality,

1 Mayne, Hindu law (10th ed., 1938), 785 sec. 650; see also Ramsumaran Prasad v. Shyam Kumari AIR 1922 PC 356; Gulab Devi v. Banwari Lal AIR 1940 All 403, 404; Rani v. Santa Bala AIR 1971 SC 1028.

2 Derrett, Hindu law past and present (Calcutta: 1957), 125 para 193; see also Pursid Narain Singh v. Honooman Sahay (1880) 5 Cal 845; Doulut Ram v. Meher Chand (1887) 14 IA 187, 196.

3 Kanhiya Lal v. Deep Chand AIR 1947 Lah 199, 208.

4 W.R. Anson, Law of Contract (London: 24th ed., 1975), 206.

quantity and the time when they are supplied they may lose their character of being necessities. Minors are obliged to pay for the necessities supplied to them¹. Law considers it to be for the benefit of a minor that he should be capable of binding himself to pay for the necessities of life supplied to him and other members of his family². But what are necessities? Necessaries is a relative term. Primarily it implies only suitable food, drink, clothing and education for the minor in accordance with his position in life and his fortune. Articles purely of ornament and luxury are not to be included in it. Sometimes, however, ornamental or luxurious articles may become necessities suitable to the state, degree and station in life of the minor. In each case it must be determined with reference to the fortune and circumstances of the particular minor³. In Peters v. Fleming⁴ Parke, B., classically observed:

"It is perfectly clear, that from the earliest time down to the present, the word necessities was not confined, in its strict sense, to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, situation, and degree in life in which he is; and therefore we must not take the word 'necessaries' in its unqualified sense, but with the qualifications above pointed out".

To be precise, the word 'necessaries' does not mean articles of comfort or convenience⁵, it implies goods

1 Coke upon Littleton, 172a.

2 Halsbury's laws of England Vol. 21, 142 sec. 320.

3 Jagan Ram Marwari v. Mahadeo Prosad Sahu (1909) 36 Cal 768.

4 (1840) 6 M & W 42; 151 ER 314.

5 J. Chitty, Contracts Vol. 1 (London: 23rd ed., 1968), 387 sec. 389.

suitable to the 'condition in life',¹ of a minor and to his actual requirement at the time of the sale and delivery². Whether an article supplied to a minor is necessary or not depends upon its general character and upon its suitability to the particular minor's means, age and station in life³. Sometimes a minor's need for a particular article also depends upon the particular circumstances under which it is purchased and the use to which it is put. Thus Cockburn, C.J., observed in Jenner v. Walker⁴ that wedding presents purchased by a minor could be deemed necessities, but in ordinary circumstances such purchases might not be so considered. Though this ruling of 1868 could well be obsolete in England, it by no means follows that it will be so in India amongst the Hindus⁵. Necessaries must be things which a minor actually needs⁶. It is not unlikely that an article which may belong to a class of things that are unquestionably necessary and which may correspond in quality and price with the minor's means, when supplied

1 Sales of Goods Act (56 & 57 Vict. c. 71), 1893, sec. 2; Indian Contract Act (Act 9), 1872, sec. 68.

2 Maddox v. Miller (1813) 1 M & S 738; 105 ER 275; Harrison v. Fane (1840) 1 M & G 550; 133 ER 450; Brooker v. Scott (1843) 11 M & W 67; 152 ER 718; Barnese v. Toye (1884) 13 QBD 410; Johnstone v. Marks (1887) 19 QBD 509; Sadasheo Balaji v. Firm Hiralal AIR 1938 Nag 65, 67.

3 Nash v. Inman (1908) 2 KB 1.

4 (1868) 19 LT 398 (NS).

5 Juggessur v. Nilambur (1865) 3 WR 217; Makundi v. Sarab-sukh (1884) 6 All 417.

6 Pollock and Mulla, Indian Contract and Specific Relief Acts (Bombay: 9th ed., 1972), 116, 486; A.C. Dutt, Indian Contract Act (Calcutta: 4th ed., 1969), 571-74; K. Venkoba Rao, Indian Contract Act (Delhi: 1955), 541.

turns out to be in excessive supply to the minor; that is, the minor was already plentifully supplied with that article¹. In such a case the thing supplied does not fall within the description of necessities. Lord Esher, M.R., observed in Johnstone v. Marks² that the true question is not a mere abstract one whether the articles supplied were in their nature necessities, but a practical question whether they were necessary for the minor, and they could not be if the minor already had plenty of them. In an action against him the minor may show that he was already fully supplied with similar goods, and it is immaterial whether the plaintiff knew it or not³. A certain amount of urgency about the minor's need has been regarded as an essential element in a transaction with a minor; the expenditure must be for some purpose the accomplishment of which cannot well be postponed without irremediable detriment to the minor himself or to some person whom he was legally bound to support⁴. Necessaries for the wife and children of a minor are also necessities for him⁵.

Generally the question of alienation of a Hindu minor's separate individual property for his maintenance

1 Nash v. Inman (1908) 2 KB 1.

2 (1887) 19 QBD 509.

3 Ford v. Fothergill (1794) 1 Peake 301; 170 ER 164; Barnes v. Toye (1884) 13 QBD 410.

4 Cunningham and Shepherd, Indian Contract Act (Calcutta: 3rd ed., 1878), 200-01; Chapple v. Cooper (1844) 13 M & W 252, 153 ER 105; Walter v. Everard (1891) 2 QB 369; Sham Charan v. Chowdhury (1894) 21 Cal 872; Nandan Prasad v. Ajudhia (1910) 32 All 325 (FB).

5 W. Macpherson, A Treatise on the law Relating to Infants (London: 1842), 502.

and support does not arise so long as he lives in a joint Hindu family. His necessities for necessities are met out of the joint family property managed by the father or other elderly members of the family as manager. Under the Hindu law it is the legal obligation of the father to maintain his minor sons and unmarried daughters¹ whether he possesses any property or not, separate or self-acquired². The obligation of a non-father manager to maintain them arises from the fact that the manager is in possession of the family property both under the Mitakshara and the Dayabhaga schools. As seen earlier, a minor gets only an interest in the joint family property if the family is governed by the Mitakshara law, and not even that if it is governed by the Dayabhaga law, since under the latter a minor's interest in the family property does not accrue until the father dies. The interest which a minor has in a Mitakshara joint family property can be alienated by the father or manager along with that of others for the necessity of the family as a whole, and in the disposition of this interest the father's or manager's power is greater than that of the guardian of a minor's property. In the absence of any joint family property and for the necessity of the minor and his dependants, the father or other near relations may alienate the minor's individual property

1 Manu VIII. 389; Hindu Adoptions and Maintenance Act (Act 78) 1956, sec. 20.

2 Mulla, Hindu law (Bombay: 13th ed., 1966), 540 sec. 545; Mayne, Hindu law (11th ed., 1950), 817 sec. 685.

only as guardian; and the minor would be bound by such alienations even if they are made without the sanction of the court provided they are effected for the necessity or benefit of the minor.

Under Muslim law, by contrast, the expenses for the maintenance of a minor are first charge on the minor's own property. Although a father is bound like a Hindu father to maintain his minor children and nobody shares his obligation, the expenses for the maintenance of his minor children are not a liability to be met out of his property as long as the children have their own property, movable or immovable. At Common law, however, a father was under a moral obligation to maintain his minor children¹ whatever their circumstances would be². Cockburn, C.J., observed³:

"Except under the operation of the poor law, there is no legal obligation on the part of the father to maintain his child, unless, indeed, the neglect to do so should bring the case within the criminal law. Civilly there is no such obligation".

In India, Pakistan and Bangladesh like a Hindu or a Muslim father a Christian father is bound to maintain his minor children⁴ but unlike them he cannot alienate his

1 Blackstone, Commentaries Vol. 1, 449; A.H. Simpson, A Treatise on the Law and Practice relating to Infants (London: 4th ed., 1926), 129; Halsbury's laws of England Vol. 21, 189; Stephen's Commentaries on the laws of England (London: 21st ed., 1950) Vol. 2, 509; Bromley, Family law, 402, 469.

2 Macpherson, Infants, 219.

3 Bazeley v. Forder (1868) 3 QB 559.

4 Trevelyan, Minors, 206.

children's property for their necessities. In case of a minor's need a Hindu father can dispose of the minor's property without the court's permission, but if a Muslim father does it without the court's permission he will not have a recourse against the minor's property if the expenditure for necessities exceeds the minor's money in his hands, while a Christian father cannot in any way give a valid title to an alienee of the minor's property. Of the three minors, Hindu, Muslim and Christian, the Muslim minor's property is spent first for his maintenance, while the property of their parents, in the case of a Hindu and a Christian minor, is spent for their maintenance. But a Christian minor being governed by English law his parents or guardians cannot be forced by the civil courts to provide him maintenance.

Trevelyan observes¹,

"Although that law [English law] recognizes the duty of the father to maintain and educate his children, the Civil Courts have no direct means of enforcing this obligation, so as to compel him to maintain them out of property in which they have no interest".

1 Minors, 209. After the Second World War new statutes were passed in England to compel the parents either to maintain or to contribute towards the maintenance of their children. Thus the National Assistance Act (11 & 12 Geo. 6, c. 29) 1948, secs. 42(1) and 64(1) imposed upon each spouse the liability to maintain his or her children under the age of sixteen years, and was required to repay any assistance given to such children under the Act. The husband's Common law liability was not relieved by the wife's statutory liability. Under the Matrimonial Causes Act 1950 the court of competent jurisdiction can on a wife's application order a husband who wilfully neglects to maintain his minor children to make such periodical payments as may be just. Under social legislation financial assistance
(contd.)

However, under Hindu law when a guardian alienates his minor ward's property for his necessities, primarily the validity of the alienation would be determined not by the alienability of the property, but according to the goods' becoming necessities. The guardians would be justified in selling, leasing or charging the minors' property for the necessities of them and their dependants. East, C.J., observed in Doe dem Bissonaut v. Doorqapersaud Day¹ that it was not necessary to authorise the sale of a minor's property that the family should be in absolute and urgent want of the necessities of life at the very

(contd) is given by means of family allowances out of public funds towards the maintenance of minors [see Family Allowances Act (8 & 9 Geo. 6, c. 41) 1945; Family Allowances and National Insurance Act (15 & 16 Geo. 6 & 1 Eliz. 2, c. 29) 1952; and Family Allowances and National Insurance Act (4 & 5 Eliz. 2, c. 50) 1956]. A similar relief is provided under the Ministry of Social Security Act 1966 to relieve the poor parents and help them perform their social and legal duty of maintaining their children by providing money payments by the state in respect of the children of the family who are not yet earning their living. Previously mother had the 'agency of necessity' at Common law under which she could purchase necessities both for herself and for her minor children by pledging the father's credit; it is now abolished finally by the Matrimonial Proceedings and Property Act 1970. It is to be remembered that no two orders for financial provision for a child may be in force at a time. It was not a correct statement of law when a Full Bench of the Kerala High Court in Commissioner of I.T. v. Paily Pillai [(1972) KLT 24 (FB)] says that English law gives a child no right to be maintained by his parent [see Derrett, 'Crumbs from the table: the Christian child's plight', in (1972) KLT (Jour) 39-41]. The basic jurisdictional inadequacy of civil courts under Common law is still obtaining in the whole Subcontinent, and for this reason the civil courts can, in matters of a minor's custody, exercise their jurisdiction but when the question of maintenance arises they cannot [see Walter v. Walter AIR 1928 Cal 600; Chakko v. Daniel AIR 1953 Tra-Co 60.

1 (1815) 2 Morley's Digest, 49.

moment, or sufficient to take away the power, that they were subsisting at the time upon the charitable donations of their friends and relations, who could at any moment withdraw their help from them. The learned Chief Justice continued in observing that land should not be sold at a moment's warning. If a family does not have any certain resource for the future, and any actual means of providing for its members the decent necessities of life according to their condition, and if its members live on casual charity and not on any regular competent allowance, it constitutes a reasonable necessity to warrant the sale of the family property. If a minor has any other means of subsistence, his property cannot be sold for his maintenance. Thus where a mother sells the property of her minor son for the support of herself and the son while the son's father is living and capable of supporting the son, the sale is liable to be set aside¹, even though under Hindu law such an alienation by the mother may be allowed².

The word 'necessaries' is not confined merely to goods, it includes also expenses for instruction³ and for certain other services as well. The necessary expenses for defending a suit brought against the minor⁴, money advanced to procure the minor's discharge from an arrest⁵

1 Kishen Lochan Bose v. Tarini Dasi (1830) 5 Sel. Rep 66 (NE).

2 Macnaghten, Hindu law Vol. 2, 293 case 2.

3 Coke upon Littleton, 172a; Walter v. Everard (1891) 2 QB 269, 274.

4 Gunga Pershad v. Phool Singh (1868) 10 WR 106 (CR).

5 Clarke v. Leslie (1803) 5 Esp 28; 170 ER 726.

and money spent in defending the minor in a criminal prosecution¹ are moneys advanced or spent for necessities. It also includes reasonable marriage expenses of the minor's dependants². Once the expenses of the minor's own marriage or of other minor members of his family were considered as necessities³, since child marriage was in practice in the society and the sastric texts enjoined such marriage⁴. After the Child Marriage Restraint Act (Act 19) of 1929 and the Hindu Marriage Act (Act 25) of 1955 the marriages of minors have become a punishable offence⁵, and the expenses for such marriage do not constitute a legal necessity justifying alienation of a minor's property. The expenses for the performance of an indispensable

1 Sham Charan v. Chowdhury (1894) 21 Cal 872.

2 Preaj Nurain v. Ajodhyapurshad (1848) 7 Sel. Rep 602 (NE); Sundrabai v. Shivnarayana (1908) 32 Bom 81. In this case Chandavarkar, J., in delivering the judgment of a Division Bench dissented from Govinarazulu v. Devarabhotla (1903) 27 Mad 206 in which the marriage of sons was not considered to be a moral or religious obligation on either the father or other coparceners in the event of the father's death. See also Shriniwasrao v. Baba Ram AIR 1933 Nag 285; Bachu Singh v. Baldeo Prasad AIR 1933 Oudh 132, 134; Krishnama-chari v. Ramabadran AIR 1952 Mad 706.

3 Juggessur v. Nilambur (1865) 3 WR 217 (CR); Makundi v. Sarabsukh (1884) 6 All 417, 421.

4 Manu IX. 94; Gaut. XVIII. 21; Yajn. I. 64; Vas. XVII. 71; Kaut. 3.3.1. See also S.C. Banerjee, Hindu law of Marriage and Stridhan (Calcutta: 5th ed., 1923), 48; Sarkar Sastri, Hindu law (Calcutta: 7th ed., 1936), 127.

5 Derrett, Introduction, 157 para 238; N.R. Raghavachariar, Hindu law (Madras: 6th ed., 1970), 1068; Pan Mal v. Gad Mal (1936) 63 Cal 1153; Hansraj v. Askaran AIR 1941 Cal 244; Bajamoni v. Paramoni Debi (1950) Cut 362, 372; Tattya v. Rabha AIR 1953 Bom 273; Rambhu v. Rajaram AIR 1956 Bom 250.

religious duty, such as initiatory ceremony of the minor¹, the funeral ceremonies² or the sraddh of the minor's father³, or of his father's widow⁴, are necessities. Fulton, J., observed⁵:

"Doubtless, we have to determine what are necessities according to Hindu ideas, and a pilgrimage may be looked upon as beneficial. But we think we should be extending the meaning that has hitherto been assigned to the word if we were to sanction as a binding charge on the defendant a debt contracted for a pilgrimage not undertaken in discharge of any urgent spiritual duty, which it was obligatory on him to perform".

The necessity for expenses or services which are recognised in law is called legal necessity. In describing the legal necessity of a joint Hindu family K.K. Bhattacharyya observes⁶:

"Legal necessity is of various forms. All the indispensable religious ceremonies, the sacraments, such as marriage and the investiture with the sacred thread, the obsequies, the cremation, the periodical oblations to the manes, the ceremonies customary in the family, the subsistence of the family, the education of the younger members, the payment of the ancestral debts, the giving of presents at particular seasons and on special occasions to the relatives, --- these and a thousand other causes of expenditure are constantly cropping up in a fairly prosperous Hindu joint family. All these are in the strict sense of the word, lawful necessities".

1 Macnaghten, Hindu law Vol. 2, 296-97 case 6.

2 Nathuram v. Shoma Chhagan (1890) 14 Bom 562.

3 Priyabala Dasi v. Hanuman Prasad AIR 1939 Cal 202, 203.

4 Sadashiv v. Dhakubai (1880) 5 Bom 450, 460.

5 Ranmal Singji v. Vadilal Vakhatchand (1896) 20 Bom 61, 73.

6 The law relating to the Joint Hindu Family (Calcutta: 1885), 488.

Long after the above observation D.K. Mahajan, J., in Sam Singh v. Ranjit Singh¹ pointed out that legal necessity changes with the change of time, and one must examine the prevailing state of society while judging whether what was a necessary item of expenditure twenty years ago still remains the necessary item of expenditure in the changed state of society. In Parasiva Murthy v. Rachaiah² Das Gupta, C.J., held that a natural guardian could alienate the minor's property only for legal necessity and for no other purpose. Therefore, unless a religious ceremony comes within the definition of legal necessity an alienation of a minor's property for it could not be justified. The best test in each case would be perhaps to see whether the alienation would have been reasonably and prudently made by the minor himself had he been of full age.

1.2.1.2 Necessity for payment of debts

(a) Ancestral debts

Debts of a minor may be either ancestral or personal; the former are the debts incurred by his ancestor or ancestors through whom he has acquired his property, while the latter are contracted either by the minor himself or by others acting on his behalf. Under Hindu law it is the

1 (1968) 70 PLR 1134.

2 AIR 1958 Mys 125.

pious obligation¹ of the sons to pay the debts of their ancestors, if they are not tainted with illegality or immorality². Sastric texts³ provided that the debts of the father and grandfather had to be paid by the sons and grandsons. There are differences among the sastric texts regarding the liability of the great grandson⁴.

Kane has deduced the following propositions from the different texts. First, the debts of a man must be paid by his three descendants if they have ancestral estate in their hands. Secondly, when no ancestral estate is taken by the descendants, the son is liable to pay his father's debts with interest, the grandson to his grandfather's debts only and not the interest, and the great grandson

1 For a detailed discussion of the pious obligation see Mayne, Hindu law (10th ed.), 423; Derrett, Introduction, 310-312 paras 503-506; the same, Critique, 93 para 127; also the same, 'Hindu law: Mitakshara: the Pious Obligation and the Doctrine of "Antecedency": the end to a prolonged controversy?', in (1955) 18 SCJ 139 ff; the same, 'Misdeeds of a Manager and the Pious Obligation', in AIR 1960 (Jour) 2-5; the same, 'The pious obligation of the Hindu son: apropos of a judicial attack on the institution', in (1970) KLT 59 ff. See also Bankey Lal v. Durga Prasad (1931) 53 All 868 (FB); Pannalal v. Naraini AIR 1952 SC 170.

2 Manu VIII. 159-160; Gaut. XII. 38; Yajn. II. 47, 54; Vas. XVI. 31; Katya. 564-565; Kaut. III. 16; Kane, Dharmasastra Vol. 3, 446-447. For details of tainted debts see Derrett, Introduction, 312-316 paras 507-511; the same, Critique, 94-108 paras 128-139.

3 Bri. XI. 49; Yajn. II. 50; Nar. I. 2; Katya. 559.

4 Brihaspati says that a great grandson is not liable to pay his great grandfather's debts (Bri. XI. 49). Visnu holds that descendants beyond the grandson need not pay if they are unwilling to pay (Vis. VI. 27-28). Narada (Nar. I. 4) and Katyayana (Katya. 560) say that the obligation to discharge a debt 'does not include the fourth in descent', but this seems to be in conflict with other sastric texts, such as Manu IX. 137; Baud. II. 9.6; Vas. XVII. 5; Vis. XV. 46.

is not liable to pay even the principal if he is unwilling to pay. Thirdly, a son is not liable to pay the illegal or immoral, i.e., avyavaharika¹ debts of his father. Fourthly, where the father is not dead, but suffering from deadly disease or living abroad the son would be liable for his father's debts after the lapse of twenty years. After a dispassionate discussion of the relevant sastric texts Kane further observes that the liability of the sons during the father's lifetime or his absence is not absolute but limited². If the son who is liable to pay the debts of his father or other ancestor is a minor, is he required to pay the debts during his minority? As seen earlier³ if a son is minor he need not pay his father's debts during his minority, his pious obligation remains suspended during his minority⁴. When the proper time to pay comes⁵ he must pay the debts, otherwise his forefathers may remain in hell. According to the sastric texts the payment of ancestral debts during the minority of a son is not a legal necessity. Since a minor son cannot exercise any power over his ancestral property until he comes of age⁶, his guardian cannot

1 For avyavaharika debts see Derrett, Introduction, 312-316 paras 507-511, the same, Critique, 101-108 paras 134-139; Mayne, Hindu law (10th ed.), 408; Paras Diwan, Hindu law, 270.

2 Kane, Dharmasastra Vol. 3, 446.

3 See supra, 38-39.

4 See the comments of Jagannatha on Nar. I. 3 in the Digest Vol. 1, 284 (v. 181) where in commenting on the three verses of Narada, viz., Nar. I. 2; I. 3 and I. 14, he observes that excepting debts under Nar. I. 14 none need to be paid immediately.

5 After the lapse of 20 years when the father is suffering from deadly disease or travelling abroad, or after attaining majority when he is dead.

6 Macnaghten, Hindu law Vol. 2, 277 case 10, 305 case 14.

alienate the minor's property for his ancestral debts until he attains majority, and if he does, it would be null and void according to sastric law¹.

The Anglo-Indian courts did not follow the sastric mode of payment of a minor's ancestral debts and allowed discretion² to guardians in their payment. The sastric view that the creditors had no right to demand the debts during the minority of a son, and that they must wait until the minor attained majority was given up, and the discharge of ancestral debts began to be regarded as a necessity. Indeed after Hunoomanpersaud's case the sastric mode of payment of ancestral debts fell into oblivion. In Vembu Iyer v. Srinivasa Iyengar³ Sundara Aiyar, J., observed:

"Prior to the enunciation of the law by the Privy Council, there appears sometimes to have been an idea in India that the creditors of a minor had no right to demand their debts during his minority

1 Macnaghten strongly observes that "there is nothing whatever, in any text that I have been able to discover, relative to the payment of debts by a guardian". See his Hindu Law Vol. 1, 110 and Vol. 2, 294 case 4. It is to be noted that in the vyavastha of this case, Zillah Nuddea June 9, 1817 the two authorities cited thereto are ascribed to Narada and Katyayana (Katya. 612) respectively, but with due respect, probably in place of Narada it would be Manu, since I could not locate this verse against Narada in the SBE, and moreover the translation of Manu VIII. 199 coincides with it and the language of the quoted verse agrees with that of the Digest Vol. 1, 475 (v. 27) which is verse Manu VIII. 199.

2 Babaji Mahadaji v. Krishnaji Devji (1877) 2 Bom 666; Nagammal v. Varada Kandar AIR 1950 Mad 606, 607; Palanippa v. A.F. Harvey AIR 1953 Tra-Co 481, 488; Gopalakrishna v. Krishna Iyer AIR 1961 Mad 348, 352.

3 (1912) 23 MLJ 638, 641-42.

and that they must wait till the minor attained age. This would of course, affect the guardian's power to deal with the estate for the discharge of the minor's father's debts. This view was, however, subsequently given up and ... it was held that the discharge of debts would be regarded as a necessity".

The duty of discharging the ancestral debts was entrusted to the guardians, and how this duty was to be performed rested on the guardians themselves. An unethical analogy between the duty of payment of a minor's ancestral debts and that of payment by a trustee of a testator's debts led to remove the difference between the payment of ancestral and personal debts of a Hindu minor. By the application of such an analogy in Gopalnarain Mozoomdar v. Muddomutty Guptee¹ Couch, C.J., found it to be a principle of Hindu law that the debts of a deceased were a charge upon his estate in the hands of the person to whom the estate came upon his death, and that the latter had the authority to pay off debts due by the deceased. The learned Chief Justice compared the payment by the guardian of a Hindu minor's ancestral debt to the case of a trust or charge created by will in English law upon personal estate for the payment of debts, the personal estate being vested in the executor or administrator as a fund for the payment

¹ (1874) 14 BLR 21, 45. In Soonder Narain v. Bennud Ram (1878) 4 Cal 76 Jackson, J., did not even feel the necessity of ascribing any reason for making the minor's real estate liable for paying his ancestral debts except simply stating that the said estate of the minor would be liable when the guardian was acting bona fide and under pressure of necessity.

of the debts¹. It is to be remembered that unlike a trustee, the property left by a deceased to his minor children does not vest in the guardian of the minors.

If the payment of ancestral debts of a minor made by others and not his father is influenced by the doctrine of pious obligation², and if the courts bring the notion of the said doctrine into play to compel the minors to pay their ancestral debts before their attaining majority, and if a guardian alienates his minor ward's property for their payment, it would be an extra-sastric action and undoubtedly an excess of a guardian's sastric capacity. Indeed pious obligation stops where guardianship starts. In Sudhanya Kumar v. Haripada³ Banerjee, J., rightly points out that a guardian of a Hindu minor cannot, in the matter of transfer of a minor's property, seek justification in the rarefied atmosphere of pious obligation without feeling himself circumscribed by consideration of material benefits of the minor. It is the duty of a guardian to preserve the estate, augment its resources and manage it as best as he can promoting the interest of the minor just as

1 Scott v. Jones (1838) 4 Cl & F 382; 7 ER 147; Freaker v. Cranefeldt (1838) 3 Myl & Cr 499; 40 ER 1019; Evans v. Tweedy (1838) 1 Beav 55; 48 ER 859. All these cases were relied on by the learned Chief Justice.

2 In Balakrishna v. Ganesa AIR 1954 Tra-Co 209, 216 (FB), Subramania Iyer, J., thought it pious obligation to meet the ancestral debts even if fresh debts were incurred for their payment by the minor's guardian.

3 AIR 1960 Cal 34, 36.

much as a man of ordinary prudence would do if it were his property. The guardian has no right or duty to acquire or accumulate for the minor any store of spiritual welfare or benefit¹.

It looks strange how the two individualistic doctrines, viz., the doctrine of pious obligation and the doctrine of minor's welfare, were unjustly harmonised by the Anglo-Indian judges through the action of a guardian who has no interest whatsoever in his ward's property and whose guiding principle of action is the well-being of the minor. There is no doubt that according to the sastric texts² a debt is not merely an obligation but a sin too, and a debtor must be relieved of the sin and saved from its degenerating effects. A son performs a pious obligation by relieving his father from the evil consequences of the sin of debt in the life hereafter, and he may acquire spiritual benefit therefrom. But there is no material benefit involved in discharging such obligation. A guardian is more concerned with the material benefit of a minor than with his spiritual well-being. He is not given the authority to sacrifice the material resources of the minor to discharge a pious obligation 'resulting in some unknown and unknowable spiritual benefit of the minor'. As the payment of ancestral debts is a pious obligation it would have been better to leave

1 Re Lalitha Bai AIR 1961 Mad 153, 157.

2 Manu XI. 66; Gaut. XII. 40; Vas. XI. 47-48; Vis. XV. 45; Mayne, Hindu law (10th ed.), 405 sec. 312. See also the judgment of B.K. Mukherjea, J., in Sriramulu v. Pundarikakshayya AIR 1949 FC 218, 238.

its payment to the discretion of the minor who could exercise it when he would attain majority than to entrust it to the discretion of the guardian.

(b) Personal debts

Debts other than ancestral are personal when they are incurred for a purpose of the person or property of the minor concerned. As seen earlier, minors may have necessity for necessities including goods and services, and their guardians can alienate their property for such necessities. Consequently, if a guardian incurs any debt for the purpose of necessities for a minor or his dependants, or if he incurs any debt for meeting the expenditure with respect to the minor's property¹, i.e., expenditure for the realisation, protection or benefit of the minor's estate, it becomes the minor's personal debt. Although a minor is incapable of entering into any contract² and he cannot be made personally liable³, his property may be made liable for necessities supplied to him or for the debts incurred for such necessities and expenditure for his property under section 68 of the Contract Act (Act 9) of 1872. The section

1 Bechu Singh v. Baldeo Prasad AIR 1933 Oudh 132. Debts incurred for the benefit of a minor's estate are also necessities within the meaning of section 68 of the Contract Act of 1872.

2 Mohori Bibee v. Dhurmodas Ghose (1903) 30 IA 114 (PC). Also see sec. 11 of the Contract Act of 1872.

3 Waghela Rajsanji v. Masludin (1887) 14 IA 89 (PC).

states:

"If a person capable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessities suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person".

But when a person incurs a debt there must be actual necessity for it, mere existence of necessary purpose would not be sufficient to justify a debt. Necessity cannot be said to exist where a sale is obtained by a vendee by taking advantage of the guardian's poverty¹. The needy circumstances of a minor do not by themselves constitute a sufficient legal necessity for an alienation², and the mere recital in a sale deed of the object of sale is in itself no evidence of the necessity of alienation³. A guardian cannot borrow ostensibly to pay land revenue where he has large resources and actual cash at hand from the minor's property⁴. When a guardian incurred debts for necessity Vivian Bose, J., in Dharamrajsingh v. Chandrasekhar Rao⁵ viewed that necessity from two angles, viz., first, necessity for the object for which the debt was incurred, i.e., the extent and intensity of the necessity for it towards the existence or well-being of the family or the preservation of its estate; secondly, necessity for the debt itself, i.e., the urgency

1 Makundi v. Sarabsukh (1884) 6 All 417.

2 Krishna Kumar v. Gopal Das AIR 1934 Oudh 475, 479.

3 Rajlakhi Debia v. Gokulchandra Chowdhury (1869) 3 BLR 57 (PC); Rani v. Santa Bala AIR 1971 SC 1031; Keluni Dei v. Kanhei Sahu AIR 1972 Ori 28, 31.

4 Ganpat Rao v. Ishwar Singh AIR 1938 Nag 476, 479.

5 AIR 1949 Nag 66, 69.

for the debt in consideration of the financial ability of the family and the possibility of alternative arrangement for obtaining the object. The learned judge observed that before an alienation was made by a guardian he must consider whether both the aspects were present or not. In the matter of incurring debts and making binding alienation of a minor's property Mahajan, J., observed in Sriramulu v. Pundarikakshayya¹ that it was the necessity for the loan and its consequent pressure on the estate which could be called the touchstone on which depended the validity and binding character of the alienation of a minor's property.

In the payment of personal debts the sastric law provides that they should be immediately paid even if the debtors are minors. Thus in the case in Zillah Burdwan, 4 December, 1817, where a widow borrowed some money to defray the necessary expenses of her minor son, the vyavasthas of the pundits show that the bond so executed by the mother for the maintenance of her minor son, is valid and binding². As authorities in this case the pundits cited Nar. I. 3 and Bri. XI. 50. Commenting on this verse of Narada, Jagannatha³ observes that this category of debts, i.e., debts incurred by joint tenants, such as uncle, brother, mother and not by the father for the support of the family must be paid

1 AIR 1949 FC 218, 250. See also Lakhmi Singh v. Mahendra Singh AIR 1949 A11 501; Jagdeo Singh v. Sitla Prasad AIR 1954 A11 71, 73 where similar views are taken.

2 Macnaghten, Hindu law Vol. 2, 289 case 13.

3 Digest Vol. 1, 284-85 (v. 181).

immediately in contradistinction with other debts, namely, debts which were contracted by the father who is dead, and debts which are contracted by the father or other coparcener who is diseased or travelling abroad. Of the last two kinds of debts the first one is required to be paid by the minor on attaining majority¹, and the last one to be paid after a waiting period of twenty years²; but in both cases the payment will be in proportion to his share in the ancestral property. And in explaining the cited verse of Brihaspati Jagannatha³ quoted the following from the Vivada-ratnakara:

"It is here implied, that a debt contracted even by others for the support of the family, must be discharged by the housekeeper".

Among the personal debts, the debts owed to the government take precedence over other debts⁴ and being debts for the minor's necessities a guardian can validly alienate the minor's property for their payment⁵. For the payment of arrear revenue even a de facto guardian may charge or alienate a minor's property. Thus where a woman borrowed money for the purpose of paying arrears of revenue which had accrued on the estate and the money so borrowed was applied bona fide to that purpose and subsequent to this transaction her son's minor widow became the owner of the property, the pundits were asked whether the minor's

1 Nar. I. 2.

2 Nar. I. 14.

3 Digest Vol. 1, 294.

4 Kaut. II. 24; Yajn. II. 41; Kane, Dharmasastra Vol. 3, 441.

5 Macnaghten, Hindu law Vol. 2, 293 case 2.

widow was liable for the payment of the debt by reason of her having come into the possession of the estate. The pundits replied in the affirmative¹. In Gooroopersaud v. Muddunmohun Soor² where the mother of a minor mortgaged her minor son's property, a Full Bench of the Calcutta Sadar Dewanny Adawlut held that a mother under Hindu law could enter into a bona fide sale or mortgage of her minor son's property for the benefit of the minor. Here benefit implies necessity since in that case the property was mortgaged for the maintenance of the minor and his mother, and for the liquidation of the government revenue. Moreover the learned judges observed that benefit created the necessity for the sale or mortgage and it was the test by which the legality of the transaction must be tried.

Under Muslim law a guardian can contract debts on behalf of the minor for the latter's necessities, but such debts are to be paid by the minor on attaining majority³. If the guardian wants to repay them he must do so in presence of witnesses or with the permission of the court, otherwise he will have to account for the payment⁴.

As seen earlier, at Common law the guardians could apply the income of a minor's property and, if necessary,

1 Gopee Churn Burrall v. Mt. Lukhee Ishwuree Dibia (1821) 3 Sel. Rep. 124 (NE). This case was approvingly cited by their Lordships in Hunoomanpersaud's case.

2 (1856) SDA 980 (Beng). This case was decided shortly after Hunoomanpersaud's case and probably before the Privy Council judgment reached Calcutta and that is why the Privy Council decision was not referred to therein.

3 Hedaya, 639.

4 Baillie, Digest Vol. 1, 692.

the capital with the sanction of the court for the minor's maintenance. A guardian could contract debt for the minor's maintenance¹ or for the benefit of the minor's estate². If the guardian had money of the minor in his hands, he must employ it in the payment of debts charged on the estate of the minor, and must not pay them with his own money³. Where he compounded a debt charged upon the minor's estate he was allowed the amount actually paid by him and not more⁴. The guardian could pay the interest due upon a mortgage of the minor's estate out of the profits of the estate⁵.

It is common that in Hindu, Muslim and Common law a guardian can alienate his minor ward's property for the repayment of debts if it becomes a legal necessity; it is also common that in the payment of debts a guardian should employ the movable property of the minor and when such property is exhausted his immovable property may be applied. In Hindu law a court's sanction may not be essential for such alienation if there is legal necessity only; in Muslim and Common law even if there is legal necessity sanction of the court is necessary for the validity of the alienation.

1 J. Comyns, Digest of the laws of England Vol. 2 (London: 5th ed., 1822), 662 (3 R 6).

2 Blue v. Marshall (1735) 3 P. Wms 381; 24 ER 1110.

3 Comyns, Digest Vol. 2, 645 (3 O 2). See also Chaplin v. Chaplin (1735) 3 P. Wms 365; 24 ER 1103.

4 Comyns, Digest Vol. 2, 645 (3 O 1).

5 Jennings v. Looks (1725) 2 P. Wms 276, 279; 24 ER 729.

As seen above in the matter of ancestral debts sastric Hindu law presents a striking similarity with Common law. In both the systems the repayment of ancestral debts is not a legal necessity so long as the minor does not attain majority. But the sastric law has fallen into disuse and become a matter of academic interest only. So far as the personal debts are concerned sastric Hindu law requires them to be paid immediately, so also at Common law. Under Muslim law there is some obvious contradiction on this point. In the general statement of principles¹ it is stated to be paid by the minor on attaining majority; while the law is stated in the particular perspective of necessity it is implied that a guardian can alienate the minor's immovable property for the repayment of his ancestral debt². It is more reasonable and adaptable to social requirements that similar to Hindu and Common law, personal debts under Muslim law are to be paid promptly, otherwise it would create inconveniences to minors, and their guardians would find it difficult to get further loans if the necessity for further debts arises, since default discourages a lender to extend loans. But most of the cases regarding personal debts are now governed by the Contract Act of 1872.

Section 19 of the Bengal Regulation 10 of 1793 and section 17 of the Madras Regulation 5 of 1804 required

1 Hedaya, 639; Macnaghten, Moohummudan law, 73, prin. 6.

2 Baillie, Digest Vol. 1, 687; Macnaghten, Moohummudan law, 64, prin. 14.

the managers of minors' estates to satisfy debts against the estates with the court's permission on demand by the creditors and consistently with the 'rights of Government'. Section 18 of both the Bengal Minors Act of 1858 and the Bombay Minors Act of 1864 provided that 'all just claims, debts, and liabilities due to or by the estate of the minor' were to be paid by the managers with the sanction of the court. But in the payment of debts and liabilities the managers had no power to sell, alienate, mortgage or otherwise incumber any immovable property, or to grant a lease thereof for any period exceeding five years without the sanction of the court.

1.2.1.3. Necessity for making gift

Under sastric Hindu law the guardian of a minor cannot make a gift of his minor ward's property for any purpose. The general principle being that the property of a minor must be preserved until he comes of age¹, none can alienate his property even for valuable consideration. Usually nothing can be more religious than the release of the spirit of a deceased ancestor by the payment of his debts. If a guardian is inhibited from paying ancestral debts by the sastric texts, it speaks clearly of his incapacity to make any gift for any religious purpose. Unlike the necessities or the payment of personal debts, promise of a gift does

1 Manu VIII. 27; Gaut. X. 48; Kane, Dharmasastra Vol. 3, 165; Macnaghten, Hindu law Vol. 2, 294-95 case 4.

not create any necessity so as to empower a guardian to alienate the minor's property. Thus where a mother consented to the alienation of her minor son's shares in a property for valuable consideration but for no necessity, the pundits considered the alienation as null and void¹ on the authorities of Manu² and Katyayana³. Indeed a guardian cannot give away his ward's property in charity⁴. The authority of a guardian to alienate a minor's property is admittedly circumscribed, and he has no power to make a gift of the minor's property. In Luchmeswar Singh v. Chairman of Darbhanga Municipality⁵ it was held that the guardian had no authority to make a gift of the minor's property in charity. The facts of the case show that a piece of land belonging to a minor was acquired by the Municipality under the provisions of the Land Acquisition Act, 1870. The minor was under the care of the Court of Wards. The Court of Wards accepted on behalf of the minor one rupee offered as nominal compensation for the land and gave possession to the Municipality. The minor brought the suit to recover possession and for mesne profits. The Privy Council held that the Court of Wards being unable to give away the land of its ward could not by colourably accepting a nominal consideration confer a valid title. Sir Richard Couch in submitting the Advice of the Judicial

1 Macnaghten, Hindu law Vol. 2, 294-95 case 4.

2 Manu VIII. 199.

3 Katya. 612.

4 Trevelyan, Minors, 176.

5 (1890) 17 IA 90 (PC).

Committee observed¹:

"It is not true, as the High Court seems to have thought, that, as the Maharaja, if were of age, might waive the right to compensation, his guardian might do so. The Maharaja, if of age, might have made a present of the land to the town, ... but it was known by all parties that the manager had no power to do this. The offer and acceptance of the rupee was a colourable attempt to obtain a title under the Land Acquisition Act without paying for land".

Sastric texts do not allow a minor to perform any religious rites² excepting the performance of funeral ones. And if he makes any transfer by gift that will be void on the ground of his own contractual incapacity in the sastric as well as in the statutory law. When such an alienation would be made by a guardian it would be invalid on the authority of the Privy Council decision. Kane observed that if a minor himself made a gift that would be voidable only³.

It is to be remembered that a father's or a manager's power to make a gift of an undivided joint family property including the interest of a minor member of the joint family for family necessity or for pious or religious purposes⁴ is much wider than and distinct from a guardian's power of alienating his minor ward's property for the latter's necessity. The interest of all members of a joint family being united and undivided, the father-manager or manager can alienate a reasonable portion of the joint family

1 (1890) 17 IA 90, 95-96 (PC).

2 Manu II. 172; XI. 37; Gaut. II. 4; Vas. II. 6.

3 Dharmasastra Vol. 3, 472.

4 Mitakshara 1.1.27-29.

property for the performance of a pious duty obligatory on the family¹. Again, the alienating father or manager has his own interest in the property alienated. A guardian simpliciter has no such interest in a minor's property; a gift by him would therefore be voidable².

Under Muslim law a guardian cannot make a gift of his minor ward's property. Even a father cannot alienate his minor son's property for valuable consideration. This is a corollary of the principle that a guardian cannot alienate the minor's property except under special circumstances³. As under Hindu law so also under Muslim law gift does not create such necessity as is required to justify an alienation of a minor's property by his guardian.

At Common law also a guardian could not make a gift of or alienate without consideration a minor's property. Since the enforcement of the Trustee Act (15 & 16 Geo. 5, c. 19) of 1925 a minor's beneficial interests in any property has been generally vested in a trustee by an order of the court, and therefore the scope of a guardian's dealing with his minor ward's property has been almost negatived. Unless authorised to do so, trustees and other

1 Guramma v. Mallappa AIR 1964 SC 510, 516.

2 Rangaswami v. Marappa AIR 1953 Mad 230.

3 Ameer Ali, Law relating to gifts, trusts, and testamentary disposition among the Mahommedans (Calcutta: 1885), 127.

persons in a fiduciary position cannot make a gift or presents out of the property which they merely hold for others¹.

1.2.2. Benefit of the estate

The second ground on which, as observed by their Lordships of the Privy Council in Hunoomanpersaud's case, a guardian or manager of a Hindu minor can validly charge or alienate his minor ward's property is the 'benefit of the estate'. But what actually amounts to 'benefit of the estate' does not admit of any precise definition and whether a particular transaction impugned in a particular case can satisfy this ground depends on the facts and circumstances of each particular case². Broadly speaking 'benefit of the estate' means anything done in respect to the maintenance, protection or improvement of the estate. The expression 'benefit of the estate' appears to be a 'gradual substitution'³ of the phrase 'for the sake of the family' as used in the translation of the text of Brihaspati⁴. As seen earlier the text of Brihaspati is the alleged basis of Hunoomanpersaud's case. In giving their own views about the benefit of the estate their Lordships observed

1 Halsbury's laws of England Vol. 18, 370; and Vol. 38, 970. See also Prescott v. Birmingham Corporation (1954) 3 All ER 698, 706.

2 Nirmal Singh v. Satnam AIR 1960 Raj 313, 317.

3 Derrett, 'Unauthorised alienations of joint family property: can they ever be void rather than voidable?', in (1955) 55 Bom LR (Jour), 105-111, 108.

4 See Colebrooke's translation of the Mitakshara 1.1.28.

that it covered all acts which a prudent owner would do 'in order to benefit the estate', and that in the determination of this benefit one must consider the actual 'pressure on the estate, the danger to be averted, or the benefit to be conferred upon it'. In the course of their judgment their Lordships stated that the reduction of interest on the mortgage amount which was arrived at between the guardian and the mortgagee by a subsequent transaction in that case should be considered as a benefit to the estate¹. From the Privy Council decision it appears that all circumstances of pressure which render the raising of money necessary for the protection or preservation of the minor's estate, or a subordinate transaction which adds financial relief to the minor's property as a whole would support an alienation of his property by his guardian. Thus where a woman, on her husband's death, sold his landed property for liquidating the arrear revenue due to the government and for the maintenance of herself and her minor son and grandson², or where a property was sold by a stepmother in execution of a decree³, the sale was considered good and valid, and done for the benefit of the estate. Indeed no greater benefit can be conferred upon an estate than to save it from extinction by sequestration.

1 Hunoomanpersaud's case (1856) 6 MIA 393, 421 (PC).

2 Macnaghten, Hindu law Vol. 2, 293 case 2.

3 Lalla Bunseedhur v. Koonwar Bindeseree (1866) 10 MIA 454 (PC).

The payment of government revenues¹ or other dues or debts², the non-payment of which would imperil the estate, confers benefit on the estate. Sometimes even the substitution of an unproductive land for a more productive and suitable one by sale and purchase is considered to be for the benefit of the estate. Thus the sale of a property which is situated at a long distance from the residence of a family and which cannot be conveniently managed, with the intention of purchasing other landed property in a more accessible situation³, or the sale of a property in order to migrate to another place and purchase lands there which are more productive⁴, is considered to have been for the benefit of the estate. The sale of a minor's excess land in anticipation of its being acquired by the government at a comparatively low price under a land reform legislation is also considered to have been for the benefit of the minor's estate⁵. Again, where a guardian effected a sale of his minor ward's lands which were 'sandy, barren, useless and did not yield any income or profit', and invested the sale proceeds in arable, income yielding and cultivable

1 Ram Lochun Raee v. Ramunee Mohun Ghose (1846) SDA 371 (Beng); Gooroopersaud v. Muddunmohun Soor (1856) SDA 980 (Beng).

2 Chetty Colum Comara v. Rajah Rungaswamy (1861) 8 MIA 319 (PC); Succaram Morarji v. Kalidas Kalianji (1894) 18 Bom 631; Murari v. Tayana (1895) 20 Bom 286.

3 Jaqat Narain v. Mathura Das AIR 1928 All 454 (FB). See the contrary views in Ganesa Aiyar v. Amirthasami Odayar (1918) MWN 892.

4 Prasad v. Subbaiah AIR 1973 AP 214, 217.

5 Sakthi v. Kuppathammal AIR 1960 Mad 394.

lands¹, or where he effected the sale of an unproductive land for repairing a dilapidated family house², the sale was held to have been for the benefit of the estate.

Under Muslim law a guardian can alienate his minor ward's property for the benefit of the minor or his estate. He can sell the minor's property if he obtains double value³, or for the payment of government revenue (khuraj)⁴. Again where the produce of a minor's property is not sufficient to meet the expenses of keeping it, or where the property is in the danger of being destroyed, or where it has been usurped and there is no chance of its restitution, the guardian can validly alienate the minor's immovable property⁵.

At Common law a guardian could not exercise any such power without the leave of the court. Trevelyan observes that the law applicable to persons other than the Hindus and Muslims does not permit guardians, other than those appointed by the court, or having power given to them by the instrument appointing them, to sell or charge the immovable property of their minor wards⁶.

Early British Regulations allowed the managers of minors' estates to spend the surplus profits for the benefit of the estates. Section 12(2) of the Bengal Regulation 10 of 1793 and section 16(1) of the Madras

1 Rabi Narayan v. Kanak Prova Debi AIR 1965 Cal 444, 445.

2 Govinda Pillai v. Pathimunnissa (1958) 2 MLJ 28.

3 Macnaghten, Moohummudan law, 64 prin. 14.

4 Baillie, Digest Vol. 1, 687.

5 Macnaghten, Moohummudan law, 64 prin. 14.

6 Trevelyan, Minors, 167.

Regulation 5 of 1804 empowered the managers of minors' estates to spend the surplus incomes of the estates for the improvement of lands or 'otherwise for the benefit of the estate under his charge'.

1.2.2.1. Another Privy Council decision on the meaning of 'benefit of the estate'

The courts are not, however, unanimous with respect to the meaning of the expression 'benefit of the estate', although the terms 'necessity' and 'benefit of the estate' are being used side by side ever since the decision in Hunoomanpersaud's case. Discussing the earlier Privy Council decisions¹ regarding the meaning of the said expression their Lordships of the Privy Council in Palaniappa Chetty v. Devasikamony² said:

"No indication is to be found ... as to what is ... the precise nature of the things to be included under the description 'benefit to the estate'. It is impossible ... to give a precise definition of it applicable to all cases, and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this connection, to be taken as benefits and what not".

1 Hunoomanpersaud's case (1856) 6 MIA 393 (PC); Prosunno Kumari Debya v. Golab Chand Baboo (1875) 2 IA 145 (PC); Konwar Doorqanath Roy v. Ram Chunder Sen (1876) 4 IA 52 (PC).

2 AIR 1917 PC 33, 37.

1.2.2.2. Conflicting views of High Courts on the above meaning

Following the above observation of their Lordships the High Courts of the Indian Subcontinent took two divergent views on the meaning of 'benefit of the estate'. And probably the Allahabad High Court played a most significant role on this issue with its numerous cases supporting at times either of the views. Expressing the rival views Mulla says¹:

"One view is that a transaction cannot be said to be for the benefit of the estate, unless it is of a defensive character calculated to protect the estate from some threatened danger or destruction. Another view is that for a transaction to be for the benefit of the estate it is sufficient if it is such as a prudent owner, or rather a trustee, would have carried out with the knowledge that was available to him at the time of the transaction".

After an examination of a large number of cases² supporting either view a Full Bench of the Allahabad High Court held in Jagat Narain v. Mathura Das³ that there was no real justification for the view that an alienation by the manager to be binding on the estate must necessarily be of a defensive character, and that if the transaction

1 Hindu law (13th ed., 1966), 276 sec. 243A.

2 In the following cases the words 'benefit of the estate' was used in a wider sense: Tula Ram v. Tulshi Ram (1920) 42 All 559; Tahal Singh v. Arjun Das (1920) 56 IC 879; Sadhusaran Prasad v. Brahmdeo Prasad AIR 1921 Pat 99; Kalika Nand Singh v. Shiva Nandan Singh AIR 1922 Pat 122; Mahabir Prasad v. Amla Prasad AIR 1924 All 379; Jado Singh v. Nathu Singh AIR 1926 All 511. But they were used in a narrower sense in the following cases: Bhagwan Das v. Mahadeo Prasad AIR 1923 All 298; Shankar Sahai v. Baichu Ram AIR 1925 All 333; Inspector Singh v. Kharak Singh AIR 1928 All 403; Rattan Chand v. Thakur Ram AIR 1928 All 447.

3 AIR 1928 All 454 (FB).

was for the benefit of the estate and such as a prudent owner would have carried out with the knowledge that was available to him at that time, it could not be set aside. It was further laid down that the degree of prudence required would be that which an ordinary man would exercise with the knowledge available to him and the transaction would have to be judged not by the results but by what might have been expected to be its results at the time it was entered into, and that the degree of prudence to be demanded might well be held to be analogous to that which would be demanded of a trustee in an ordinary case. This decision was approved as correct by two other Full Benches¹ of the same High Court.

The Bombay High Court in Nagindas v. Mahomed Yusuf² seems to have treated the terms 'legal necessity' and 'benefit of the estate' as inter-changeable, and, therefore, they held that the benefit of the family could under certain circumstances mean a necessity for the alienation, but they admitted that the terms must be understood with due regard to the conditions of modern life. In a subsequent case³ the court adopted a narrow view. In Ragho v. Zaga⁴ Patkar, J., reviewing the important cases on the issue observed that

1 Amraj Singh v. Shambhu Singh AIR 1932 All 632 (FB) Mukerji, J., dissenting; Ram Nath v. Chiranjilal AIR 1935 All 221 (FB).

2 AIR 1922 Bom 122.

3 Venkatraman v. Janardhan AIR 1928 Bom 8.

4 AIR 1929 Bom 251.

the benefit of the estate was to be of a protective character. Nagindas's case was brought to his notice but the learned judge preferred the narrower line of decisions¹ taken in the Allahabad High Court which was, as we have already seen, not approved by the Full Bench of the same High Court in Jagat Narain's case. A Full Bench of the Bombay High Court in Hemraj v. Nathu² adopted an intermediate view. Beaumont, C.J., in delivering the unanimous judgment of the Bench observed that he could not accept the view taken in Jagat Narain's case as that went too far, nor could he accept the view of Patkar, J., in Ragho's case which was too protective to accommodate cases which might not be of such 'compelling character' that any court would hold them to be for the benefit of the estate. The learned Chief Justice said whether a transaction was for the 'benefit of the estate' or not involved the consideration of something more than merely whether the purchase price paid was a good price; it involved the further question of what was to be done with the purchase money³. He mentioned the following transactions as examples of cases that fall within the definition of benefit of the estate: (1) the sale for adequate price of land which could not be conveniently cultivated with other property of the minor, and the investment of the proceeds in the purchase of land which could

1 See supra, 123 f.n. 2.

2 AIR 1935 Bom 295 (FB).

3 This view was not accepted in subsequent cases; on the contrary, the test proposed in Jagat Narain's case has been approved by the Supreme Court in Balmukand v. Kamla Wati AIR 1964 SC 1385. See also Derrett, Introduction, 76 f.n. 4.

be so conveniently cultivated; (2) the sale of lands in order to raise money to secure irrigation or permanent improvement of the other lands of the minor; and (3) a beneficial exchange, or the sale of a house in a dilapidated condition.

More than a decade before Jagat Narain's case the Calcutta High Court held in Krishna Chandra Choudhury v. Ratan Ram Pal¹ that mere increase in the immediate income of the minor's estate did not necessarily justify the inference that the particular transaction was for the benefit of the estate. In Kamal Singh v. Sekhar Chand² Das Gupta, J., adopted the 'prudent man' test in arriving at the meaning of the word 'benefit'.

The meaning of the expression 'benefit of the estate' also came before the Lahore High Court for decision; and in Hayat Ali v. Nem Chand³ a Full Bench of that court after considering a large number of cases brought to its notice including the Full Bench cases of the Allahabad and Bombay High Courts expressed its views in favour of the decision in Jagat Narain's case when it said that the words 'for the benefit of the family' had a wider meaning than mere 'compelling necessity' and that these could not be limited to or exhausted by transactions of purely defensive nature.

1 (1915) 20 CWN 645.

2 AIR 1952 Cal 447, 451.

3 AIR 1945 Lah 169 (FB).

In its earlier decisions¹ the Madras High Court used to hold a somewhat narrow view about the import of the terms 'benefit of the estate'. But after the Full Bench decision of the Allahabad High Court in Jagat Narain's case they changed their views. In Sellappa v. Suppan² Venkatasubba Rao, J., sitting with Cornish, J., considered the question of the benefit of estate and expressed their agreement with the opinion held in Jagat Narain's case. This decision was followed by Yahya Ali, J., in Re Vasudevan³. In Medikenduri v. Venkatayya⁴ Chandra Reddy, J., observed that the validity of the sale of an ancestral land by a father did not necessarily mean that the benefit should be purely of a defensive or protective character, and that to hold such a view would be to miss the significance of the expression 'benefit of the estate'. The learned judge went further to say that if the transaction was not a speculative or risky one but beneficial or advantageous from the financial point of view and was calculated to confer a benefit on the estate, the sale must be held to be valid one and binding on the members of the family including the minors. Rajamannar, C.J., in his judgment of a Division Bench in Sengoda v. Muthuvellappa⁵ explained

1 Re Krishnaswami Doss Reddi (1912) MWN 167; Subramania Nadan v. Ramasami Nadan (1913) 25 MLJ 563; Ganesa Aiyar v. Amirthasami Odayar (1918) MWN 892.

2 AIR 1937 Mad 496.

3 AIR 1949 Mad 260.

4 AIR 1953 Mad 210.

5 (1955) 2 MLJ 331.

Sellappa's and Re Vasudevan's case and adopted a view similar to Beaumont, C.J., in Hemraj's case. In Sengoda's case an unproductive family property was sold at an advantageous price because of a town planning scheme, but since the sale proceeds were not utilised in the purchase of other income-fetching property for the family the learned Chief Justice could not call the alienation to have been made for the benefit of the family or of its estate. In Govinda Pillai v. Pathimunnissa¹ Ramaswami, J., adopted a very progressive view towards the meaning of the expression 'benefit of the estate' when he observed:

"The latter decisions have more readily recognised that if a guardian honestly and bona fide enters into transactions for the benefit of the estate and which are demonstrated to be such, those transactions would be upheld by courts.

One moment's reflection shows that in the modern stress of life if we are to follow ancient decisions, there will be a complete paralysis of all acts on the part of the guardians to augment the revenues of their wards and benefit them. If all guardians are at all times to remain summa seeking safety first in doing nothing the bettering of the prospects of the wards and even preserving properly their estate will be very poor and dim indeed".

In this case the learned judge upheld the sale of an unproductive land by the guardian of a minor limited owner. The sale was effected to repair a family house which had become dilapidated and stood in need of improvements

¹ (1958) 2 MLJ 28, 30. Also see the view of Anantanarayanan, J., in Sakthi v. Kuppathammal AIR 1960 Mad 394 where the learned judge said that the courts should take a liberal attitude in considering which measures amount to the benefit of the estate.

like plastering, putting up a terrace etc., and make it yield a steady and fixed rent. In Gopalakrishna v. Krishna Iyer¹ Ramachandra Iyer and Rajagopalan, JJ., observed that a power to sell for the benefit of the ward implied a discretion on the part of the guardian, discretion not merely to decide as to the form of alienation, but whether the alienation was at all to be made; the test should not be that there was no alternative but that whether the act was one for the benefit of the minor in the known circumstances.

A view very similar to that expressed by the Madras High Court in recent cases was adopted by the Andhra Pradesh High Court in its drive for the meaning of the words 'benefit of the estate'. A Division Bench of that High Court observed in Peddaya v. Venkayya² that the rule of the benefit of estate was not restricted to acts of defensive character; on the contrary, it included such positive acts as a prudent man would carry out. The benefit must be actual and not speculative, the calculated purchase must not be one in the realm of imagination, the sale proceeds must have been invested therein. The court is always suspicious in the case of the sale of a minor's property by his guardian, and looks carefully to the application or the intention

1 AIR 1961 Mad 348. This case was relied on by the Orissa High Court in Nidhi Padhan v. Bhainra Khadia AIR 1963 Ori 133, 135.

2 (1963) AP 99, 113.

for such application of the sale proceeds. Relying on the somewhat conservative decision of the Madras High Court in Sengoda's case Chandra Reddy, C.J., and Chandrasekhara, J., held in Thota Appanna v. Nakkava Appanna¹ that it was not competent for the legal guardian of a Hindu minor to alienate by sale the minor's immovable property for the reason that a good price was fetched by the sale and thereby the minor was financially benefitted. The learned judges observed that in the absence of proof that the guardian intended to purchase either income fetching property for the minor with the proceeds of the transaction or that he intended to invest the sale proceeds in any other manner which would be beneficial to the minor, the transaction could not be held to be for the benefit of the estate.

It is to be observed that of the two Full Bench cases, viz., Jagat Narain's and Hemraj's case, which directly dealt with the interpretation of the expression 'benefit of the estate' only Hemraj's case is concerned with the alienation of a minor's property by his guardian. In that case the mother-guardian sold her minor son's property at a comparatively high price and invested the sale proceeds in a money-lending business which the minor's father used to carry on. In Jagat Narain's case the adult

¹ AIR 1963 AP 418, 420.

male members of a joint Hindu family sold a joint family property situated at a distance of 19 miles from the family residence with the expressed purpose of purchasing another property nearer home. The purchase money was deposited in a bank which accidentally failed. But the following observation of Beaumont, C.J., in Hemraj's case has somewhat obscured his reasoning¹:

"The question whether a transaction is for the benefit of an estate or not involves the consideration of something more than merely whether the purchase price paid is a good price; it involves the further question of what is to be done with the purchase-money".

In the above statement the learned Chief Justice does not adhere closely to the Privy Council ruling in Hunoomanpersaud's case², although he has quoted a passage from the judgment of that case. He applies his mind to the guardian's intention, and there, no doubt, the two lines of approach are nearer than, at first sight, they seem to be.

Commenting on the conflicting views about the meaning of the phrase 'benefit of the estate' K.N. Ananthasubramanya

1 AIR 1935 Bom 295, 298 (FB).

2 The observation of the learned Chief Justice seems to have gone against the following statement of their Lordships in Hunoomanpersaud's case: "The purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application". [See (1856) 6 MIA 393, 424 (PC)].

Aiyer¹, an advocate of the protective theory, said that there should be no justification for any such conflict of views in respect of alienations by guardians or other persons who stand in a purely representative capacity, because quite distinct from the interests of managers or limited interest holders they had no interests in the properties alienated; the protection of the minors and their properties was alone the sole concern of their guardians. He further observed that unless an augmentation was the natural result of the conservation of the incomes arising from the minors' properties in their possession, the guardians were incompetent to augment the income or add to the properties of the minors by charging the estate of the minors with some liability.

Such an inactive position as is indicated by the writer cannot be always conceived of in the case of a guardian entrusted with the person and property of a minor. His duty is not only to conserve or accumulate the income or profits of the minor's property, but also to manage the property; and such management may require him, at times, to deal with the property itself. If the guardian acts honestly and bona fide, his acts should be upheld by the courts.

¹ 'Doctrine of benefit in Hindu law: its applicability to alienations by guardians and trustees', in (1938) 26 Travancore Law Journal, 22-80.

Benefit of the estate to be a sufficient ground for alienation need not be of a defensive character any more.

Derrett has beautifully summerised the law as follows¹:

"The courts, after long holding that the guardian might not validly make an alienation unless it were purely defensive of the minor's property and interests, have more recently taken the view that acts which are done bona fide and likely to enhance the value of the estate may be binding on the minor even if an alienation of land is involved, more particularly if the minor has in fact profited from the exchange of sources of income. An unsuccessful project may be upheld if its results, though disappointing, might have been favourably predicted by a prudent manager of property of which he was not sole owner. Similarly the earlier cases which denied that a guardian might exercise the wider and more comprehensive powers of the manager of a joint Hindu family, ... are beginning to give place to judgments which equate the powers of the two functionaries, allowing the guardian to incur debts and alienate property if in the opinion of a prudent man it would be for the benefit of the minor".

A guardian who carries out his functions faithfully can hardly confine himself to a supine reaction to crises as they arise; on the other hand, he can hardly be allowed to trade with the minor's assets even if he is a market-wizard! It is a question of the correct balance. The society of the South Asian peoples being primarily based on agriculture, and their judicial and higher administrative machineries being mainly located at distant towns, often independent and prompt actions are required to be taken by the guardians for the necessity or benefit of the minors. In such circumstances 'prudent man' test fits in with the need. But benefit of the estate alone cannot fulfil this test; it must be

¹ Derrett, Introduction, 76 para 94.

united with necessity, i.e., it must be a benefit causing or creating necessity. Moreover, such a union would help eliminate a speculative transaction.

It is to be remembered that the powers which may be allowed to the manager of a joint Hindu family consisting of minor coparceners in alienating the joint family property may not be allowed to the guardian of a minor's estate in the alienation of the minor's property. The courts do not consider them as uniform. They are usually cautious as to their own role of guardianship. Whenever the question of alienation of a minor's property by his guardian comes before them they look at it with the greatest suspicion and judge its validity by the strict application of the principles of Hunoomanpersaud's case, and even by observing the actual application of the purchase money --- an action seems to be in excess of the third principle of the Privy Council decision. While in the case of alienation of a minor's interests in a joint family property by its manager, the courts do not play any such role of guardianship. Therefore, even if the doctrine of benefit of the estate may be a ground sufficient to justify an alienation of a minor's interest in a joint family property, it will not alone save a guardian's transaction which cannot be justified by the principle of legal necessity. Even if the cases relating to the alienation of a minor's interests in a joint family property are looked at closely it would be clear that the doctrine of benefit alone does not validate a transaction

unless it is extended to include the application of the purchase money which means, in fact, necessity for the alienation. In Sengoda v. Muthuvellappa¹ Rajamannar, C.J., did not uphold the alienation of a family property by the father-manager because the sale proceeds were not utilised for the purchase of other income-fetching property for the family.

Although their Lordships in Hunoomanpersaud's case stated that a bona fide lender was not bound to see to the application of the purchase money if he honestly inquired into the existence of necessity, the judges are keen to see to the application of the purchase money in order to be doubly sure about the bona fides of both the manager or guardian and the purchaser. Undoubtedly, this is harsh and unjust to the purchaser or alienee. But perhaps the socio-economic conditions of the Asian people and the psychological distrust in guardians prompted the judges to adopt such a line of action for the safety of the minor's property. Murphy, J., expressed his mind in this regard in the following words²:

"It must be remembered that these people are peasants, whose ideas of a trust are not those of a lawyer, or such as would be commonly recognized in a city such as Bombay. There is no likelihood of any separate accounts being kept for the benefit of the trust property, and once it has become inextricably mingled with the father's property, the probability that it will ever be separated from it and handed back to the minor, to whom it belongs, short of a suit for partition, is very remote".

1 AIR 1955 Mad 531; (1955) 2 MLJ 331.

2 Ragho v. Zaga AIR 1929 Bom 251, 256.

Some people¹ think that 'benefit of the estate' is quite independent from 'necessity' and may save transactions which cannot be justified by the mere principle of legal necessity. Sundara Aiyar, J., in Vembu Iyer v. Srinivasa² maintained a difference between them in the following words:

"'Necessity' seems to connote the idea of warding off evil or the doing of something that cannot be avoided or of something which it is one's legal duty to do. To avoid the sale of a minor's property for a debt would be warding off an evil; conducting necessary repairs would also be an act of the same class. The maintenance of the minor would be a necessity as something which cannot be avoided. Performing his father's funerals would be a necessity as an act which it is his duty to perform. But over and above all these acts that are necessary there may be acts which are positively beneficial to the minor, and an alienation which would conduce positively to the benefit of the minor would be upheld apart from any necessity unless of course it is accompanied by other evil".[My emphasis]

It is to be observed that the learned judge adumbrated the possibility of such acts arising as would be upheld purely for their being beneficial to the minor, but he did not give any example. In Jagat Narain's case the learned judges of the Full Bench were almost holding such a view when by emphasising the word 'or' in the classic sentence 'The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded'³, they said that a

1 P.N. Chadha, see his book Hindu law (Lucknow: 4th ed., 1974), 301; Mookerjee and Newbould, JJ., in Krishna Chandra Choudhury v. Ratan Ram Pal (1915) 20 CWN 645.

2 (1912) 23 MLJ 638, 642.

3 Hunoomanpersaud's case (1856) 6 MIA 393, 423.

benefit of the estate such as a prudent owner would endeavour to effect was by itself a sufficient justification for the creation of the charge.

As seen earlier, necessity justifies an alienation of a minor's immovable property for his necessities; that necessity (understood as a set of acts bound to prompt an honest guardian) is also present where an alienation of the minor's property is to be justified on the ground of 'benefit of the estate'. Benefit alone cannot, in my view, be said to be a ground justifying alienation. My opinion is based on the traditional South Asian standpoint that a guardian's initiative is far too often employed for the advantage of others than the minor himself. Benefit minus necessity is hard to conceive of, and such a situation rarely occurs, especially in relation to minor's property. Benefit presupposes necessity, without necessity it could not be realised: for we are, in any case, bound to exclude speculation. A Full Bench of the Calcutta Sadar Dewanny Adawlut tersely observed¹:

"We hold that a mortgage entered into by the mother of a minor of a portion of the minor's property for the benefit of that minor, is valid under Hindu law, that benefit being the causing of, or creating a necessity which has arisen".

Further in the same judgment the learned judges said:

"The benefit of the minor, as creating the necessity is the test by which the legality of the transaction must be tried". [Underlined portions are in italics in the judgment]

¹ Gooropersaud v. Muddunmohun Soor (1856) SDA 980, 984-85 (Beng).

In respect of a minor's property the two concepts, viz., 'legal necessity' and 'benefit of the estate' are intimately connected and sometimes they are overlapping¹, but that does not imply that they are identical as Shah, J., erroneously said in Nagindas v. Mahomed Yusuf². On the contrary, they are supplementary or one is the causing of the other. The facts of the case and the reasoning of the learned judge support it. In that case the adult coparceners of a Hindu joint family contracted to sell to the plaintiff a house belonging to the family. The house was in a dilapidated condition and did not fetch any rent. It was not necessary to sell the house as the family was in good circumstances. When the plaintiff sued for specific performance of the contract, the minor coparceners objected on the ground that there was no necessity for the sale and that the contract could not affect their interests. The learned judge held that as the adult coparceners very properly decided to dispose of the house which was not in good condition and which the Municipality wanted to pull down the minor coparceners were bound by the agreement. In fact, the benefit obtained from the sale causes the necessity for it.

According to Vijnanesvara all the three expressions, namely, apatkale, kutumbarthe and dharmarthe, convey the

1 Nirmal Singh v. Satnam AIR 1960 Raj 313, 317.

2 AIR 1922 Bom 122.

sense of necessity. The 'benefit of the estate' or 'benefit of the family' is the literal construction of the expression kutumbarthe¹; therefore necessity lies at the heart of 'benefit'. Even if 'benefit of the estate' is considered to be a 'new content poured into the old norm',² expressed by the Mitakshara verse, the norm does not change its character and necessity is its meaning.

Trevelyan observes³:

"Apart from necessity, it is not easy to say what is for the benefit of the minor's estate. It is clearly not intended that this power should authorize the guardian to sell or charge the inheritance for the purpose only of increasing the immediate income of the minor or of his estate, or for developing the estate".

1.2.3. Extension of the rule in Hunoomanpersaud's case to other transactions and institutions

1.2.3.1. Other transactions

Although the decision in Hunoomanpersaud's case was in relation to the mortgage of a minor's property, it was not confined to mortgage alone. It was extended to sale

1 Paras Diwan, Hindu law, 275. See also Derrett, 'May a Hindu woman be the manager of a joint family at Mitakshara law?', in (1966) 68 Bom LR (Jour), 1-11, 4. The writer has given the meaning of the expression 'kutumbartha' as used in Nar. II. 15, as 'benefit of the estate'.

2 Budhkaran Chaukhani v. Thakur Prosad AIR 1942 Cal 311, 320 per Pal, J. The learned judge construed the expression 'kutumbarthe' as 'for the sake of the family', but he thought that the 'benefit of the estate' was a new addition made by their Lordships in Hunoomanpersaud's case to the verses of the Mitakshara.

3 Minors, 154.

as well¹, for mortgage was inconceivable without the power of sale. Trevelyan observes²;

"No distinction can be drawn between the power to charge and the power to sell. The need which would justify the exercise of the one power would justify the exercise of the other".

The rule in Hunoomanpersaud's case is also extendable to all transactions effected by one on behalf of another. Derrett says³;

"There is no reason why the rule in Hunoomanpersaud's case should be confined to sales and mortgages; indeed there is every reason why it should apply to any transactions with a person who acts for the sake of another".

1.2.3.2. Other institutions

The decision in Hunoomanpersaud's case established the law with regard to the alienation of a minor's property by the guardian or manager of his estate. Subsequently its rule was extended by later Privy Council and Indian High Courts to other institutions as well. Thus it was applied to adjudge the validity of an alienation of a joint family property by the manager of that family⁴, or of a woman's estate by

1 Ram Pershad v. Rajunder Sahoy (1866) 6 WR 262, 264 (CR); Gunqa Pershad v. Phool Singh (1888) 10 WR 106 (CR); Mohanund Mondul v. Nafur Mondul (1899) 26 Cal 820 per Maclean, C.J.; Ram Charan v. Mihin Lal (1914) 36 All 158; Krishan Das v. Nathu Ram (1926) 54 IA 79, 84 (PC); Hitendra Narayan v. Sukhteb Prasad (1928) 115 IC 886; Commissioner of Agricultural I.T. v. Jagadish Chandra Sahoo (1961) 1 Cal 379.

2 Minors, 153.

3 Critique, 192.

4 Luchmeedur Singh v. Ekbal Ali (1867) 8 WR 75, 77 (CR); Gharib-ul-lah v. Khalak Singh (1903) 30 IA 163; Gajadhar Mahton v. Ambika Prasad (1925) 47 All 459, 461 (PC); Benares Bank Ltd. v. Hari Narain AIR 1932 PC 182, 185.

a limited heir¹, or of a temple or debutter property by the manager, shebait or dharmakarta of the temple². In Sriramulu v. Pundarikakshayya³ Mukherjea, J., said:

"The principle enunciated in Hunoomanpersaud Pandey's case has been followed since then in numerous cases by the Privy Council as well as by the High Courts in India and the principle has been applied to alienations by limited heirs like the Hindu widows, by managers of Hindu joint family and religious endowments and also by persons in charge of the estate of lunatics. The case itself related to a transaction by way of mortgage, but it cannot be disputed that the same principle applies to a sale".

Although the rule was so extended and applied, the difference between the powers of a guardian or manager of a minor's estate and those of the other institution holders continued.

(a) Difference between the powers of the guardian or manager of a minor's estate and those of the manager of a joint Hindu family

We have seen earlier that usually under the sastric texts no individual coparcener including the manager had any power to dispose of the joint family property without the consent of all others, and to this general rule exceptions were provided by the text of Brihaspati which was commented upon by Vijnanesvara to imply that in apatkale, for kutumbarthe and for dharmarthe even a single member of the family could

1 Ram Gopal v. Ballodeb Bose (1864) WR 385, 386 (CR); Collector of Masulipatam v. Cavalry Vencata (1861) 8 MIA 529 (PC); Venkaji v. Vishnu (1893) 18 Bom 534, 536; Viraraju v. Venkata-ratnam AIR 1939 Mad 98, 100; Jaisri v. Rajdewan AIR 1962 SC 83, 86-87.

2 Prosunno Kumari Debya v. Golab Chand Baboo (1875) 2 IA 145 (PC); Palaniappa Chetty v. Devasikamony AIR 1917 PC 33, 36.

3 AIR 1949 FC 218, 232.

dispose of the family property. The course of judicial decisions has gradually modified Vijnanesvara's interpretation and re-classified the exceptions as follows¹:

- (i) legal necessity implying apatkale and including a part of kutumbarthe which relates to the benefit of the members of the family;
- (ii) benefit of the estate implying kutumbarthe so far as it relates to the benefit of the family; and
- (iii) acts of indispensable duty which include all that are implied by dharmarthe.

Although previously it was held that for an alienation by the manager of a joint family property the consent of the coparceners was necessary, a long series of judicial decisions provided that when the manager exercised power of alienation in exceptional cases, the consent of other coparceners would be implied². If the manager is a father he has two additional powers, viz., (i) he may make gifts of affection to a reasonable extent of immovable property of the family³, and (ii) he may, by incurring debts, so

1 Paras Diwan, Hindu law, 275.

2 Mayne said: "The whole current of authorities, however, supports the view that the manager of the family property has an implied authority to do whatever is best for all concerned, and that no individual can defeat this power merely by withholding his consent. For, where family necessity rests upon the coparceners as a whole and it is proper to imply a consent of all of them to that act of the one which such necessity has demanded". [See Mayne, Hindu law (10th ed.), 468].

3 Guramma v. Mallappa AIR 1964 SC 510; Ammathayee v. Kumaresan AIR 1967 SC 569.

long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for the payment of that debt¹.

Unlike the manager of a joint family, the guardian of a minor's property is not the owner of the property; ownership lies with the minor. Where the minor is a member of a joint family his ownership is not distinct, and is only of a fluctuating interest crystalizing into a definite share only after partition. The interest of a minor in the joint family being not definite, it is liable to meet the fair demand of the joint family, though he may not have derived any benefit out of it. Any debt contracted by the manager for family purposes is binding even on the minor's interest. Although a manager can bind the share of a minor in a joint family property for joint family trade debts, he cannot do so when new trades are started by him². The manager of a joint family has certain powers which a guardian may not have. Thus while the power of a guardian is that of an ordinary prudent man in dealing with the minor's property, the manager has a greater freedom. The latter cannot be called upon to account for being imprudent provided his acts are not fraudulent; he cannot be called upon to account

1 Derrett, Introduction, 275 para 447; Brij Narain v. Mangla Prasad AIR 1924 PC 50, 56.

2 Joykisto Cowar v. Nittyanund Nundy (1878) 3 Cal 738 (FB); Rampartab v. Foolbai (1896) 20 Bom LR 767; Nunna Setti v. Chidaraboyina (1902) 26 Mad 214; Bishambar Nath v. Fateh (1906) 29 All 176; Benares Bank Ltd. v. Hari Narain AIR 1932 PC 182.

for such sums as he might have saved had he acted like an ordinary prudent man¹. In Labhu Ram v. Bhaq Mal² the guardian's liability was extended to what he would have received but for his gross and wilful default, but a manager in that way cannot be called upon to account for what he ought to or might have received if the property had been properly dealt with or properly invested³. Only if the manager fraudulently misappropriates the family fund will he be held responsible to make good the loss⁴. Again, the manager of a joint Hindu family is empowered to make a gift of a portion of the family property for pious purposes within reasonable limits⁵, while a guardian cannot exercise any such power. In Palaniammal v. Kothandarama⁶ the mother of a minor sole coparcener was not allowed as guardian to exercise this power. Mayne said that a father and head of a family might have greater powers than a guardian, but could not have less⁷.

1 Tara Chand v. Reeb Ram (1866) 3 Mad HC Rep 177; Balakrishna Iyer v. Muthusami Iyer (1908) 32 Mad 271; Official Assignee v. Rajabadar Pillai (1924) 46 MLJ 145.

2 (1920) 54 IC 926.

3 Muhammad Askari v. Radhe Ram (1900) 22 All 307; Perrazu v. Subbarayadu AIR 1922 PC 71; Sirikant Lal v. Sidheshwari Prasad (1937) 16 Pat 441;

4 Ramnath v. Goturam (1919) 44 Bom 179; Benoy Krishna v. Amarendra Krishna (1940) 1 Cal 183.

5 Sithamahalakshamma v. Kotayya (1936) 71 MLJ 259; Zamindar of Kallikote v. Beero Pillai (1936) Mad 825.

6 AIR 1944 Mad 91.

7 Hindu law (10th ed.), 470.

(b) Difference between the powers of a limited heir and those of the guardian of a minor's estate

Although under Hindu law the powers of a widow or other female heirs were limited, their right was of the nature of a right of property, and their position was that of an owner¹. A widow used to hold an estate of inheritance to herself and until the termination of this estate it was impossible to say who were the persons who would be entitled to succeed as heirs to her husband². The purposes which authorised her to mortgage, sell or otherwise alienate, in whole or in part, this estate were stated by the Judicial Committee in Collector of Masulipatam v. Cavalry Vencata³ in the following words:

"It is admitted, on all hands, that, if there be collateral heirs of the husband, the widow cannot of her own will alien the property except for special purposes. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last, she must show necessity. On the other hand, it may be taken as established that an alienation by her, which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred. But it surely is not the necessary or logical consequence of this latter proposition, that, in the absence of collateral heirs to the husband, or on their failure, the fetter on the widow's power of alienation altogether drops. The exception in favour of alienation with consent may be due to a presumption of law that, where that consent is given, the purpose for which the alienation is made must be proper".

1 Janaki v. Narayansami (1916) 43 IA 207 (PC).

2 Moniram v. Kerry (1880) 7 IA 115, 154 (PC).

3 (1861) 8 MIA 529, 550 (PC).

Again in Bhushana Rao v. Subbaya¹ their Lordships of the Privy Council observed:

"The power of a Hindu widow to alienate the estate inherited by her for purposes other than religious or charitable is analogous to that of a manager of an infant's estate, as described in 6 M.I.A. 393. She can alienate it, not only for legal necessity, but also for the benefit of the estate".

It is clear from the above Privy Council decisions that so far as her powers of alienations are concerned a widow or a female limited owner can also alienate for religious or charitable purposes in addition to her powers which are obtained by a guardian under Hunoomanpersaud's case. In Parasiva Murthy v. Rachaiah² Das Gupta, C.J., said that under Hindu law a widow could transfer the widow's estate not merely for legal necessity but for other reasons, one of such reasons being religious or charitable purposes; but the guardian of a minor could only alienate the property for legal necessity or benefit of the estate and for no other purpose. The duty of a guardian is to preserve the minor's estate, augment its resources and manage it as best as he can, but not to confer spiritual benefit or welfare or bliss upon the minor, still less any relative of the minor. Any analogy between the powers of a widow acting for the spiritual welfare of her husband and those of the guardian of a minor's estate can only result in strange anomaly³. The guardian has

1 AIR 1936 PC 283, 284.

2 AIR 1958 Mys 125.

3 Re Lalitha Bai AIR 1961 Mad 153, 157. A widow's power to burden the estate for voluntary acts conducive to the spiritual welfare of her husband is substantial [see Ram Dulare v. Batul Bibi AIR 1976 All 135].

no duty to earn piety or spiritual benefit for his ward in exchange or commutation of a portion of the estate however small or negligible it might be. The distinction between the legal capacity of a Hindu widow inheriting her husband's estate and that of a guardian is well brought out by King, J., in Palaniammal v. Kothandarama¹ in the following words:

"It is now argued that what can be done by the manager of a family and what can be done by a widow in possession of the family properties can be done also by a widow as guardian or her infant son who is the owner of the properties. No authority has been cited which bears directly on this point. The learned Advocate-General has relied strongly upon 22 Mad. 113 [Ramaswami Iyer v. Vengiduswami Iyer]. A widow has full power to deal with the estate subject of course to the ordinary restrictions of a widow's right to alienate, but here the owner of the estate is not the widow at all but the plaintiff. We see no reason why we should hold in the interests of a donee that a marriage gift which can be made by the manager of a joint family can also be made by the guardian of the only person now constituting the family. Such a gift can be validated only if it is made for purposes binding upon the minor. It is not contended here that the minor, had he been a major, would have been compelled to make the gift. He could have pleased himself whether he made the gift or not".

Similarly in Commissioner of Agricultural Income Tax v. Jagadish Chandra Sahoo² where a mother effected as guardian of her minor sons a gift of the minors' immovable ancestral property on the basis of a deed of trust in order to fulfil the alleged cherished desire of the minors' father, Bachawat, J., treated the alienation as made unauthorised.

1 AIR 1944 Mad 91, 92.

2 AIR 1960 Cal 546; (1961) 1 Cal 379.

In Sudhanya Kumar v. Haripada¹ it was observed:

"A guardian is mainly concerned with the custody, maintenance, education and health of the minor and it is his duty to deal with the minor's estate as carefully as a man of ordinary prudence would deal with it, as if it was his own. He should avoid experimenting with things said to be spiritually beneficent to a minor and seeking justification for transfer of minor's estate in pious or spiritual considerations".

(c) Difference between the powers of the guardian of a minor's estate and those of the shebait, manager or dharmakarta of a temple

All the three terms, viz., manager, shebait and dharmakarta are more or less synonymous, implying a person who is entrusted with the possession and management of a debutter property. In Bengal the person is called shebait, in Tamilnadu and Andhra Pradesh dharmakarta and in English manager². The position of a manager, shebait and dharmakarta of a temple towards debutter property is not similar to that of a trustee in English law; it is only that they are to perform certain duties which are analogous to those of trustees³. The legal estate in debutter property does not vest in them but in the deity or the institution⁴. In discussing the powers of a

1 AIR 1960 Cal 34, 36.

2 Derrett, Introduction, 498 para 790; Paras Diwan, Hindu law, 431. For difference among them see Mayne, Hindu law (10th ed.), 928 sec. 796.

3 Derrett, 'The reforms of Hindu religious endowments', in D.E. Smith ed., South Asian Politics and Religion (Princeton University Press, 1966), 311, 327ff. Also see J.C. Ghose, Hindu law of impartible property and endowments (TLL, 1904), 350-353.

4 Mayne, Hindu law (10th ed.), 929 sec. 796.

shebait their Lordships, per Sir Montague E. Smith, said¹:

"But, notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is, in their Lordships' opinion, competent for the sebait of property dedicated to the worship of an idol, in the capacity as sebait and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them. The authority of the sebait of an idol's estate would appear to be in this respect analogous to that of the manager for an infant heir".

Although at the inception a shebait had little interest in debutter property, his right began to develop during the later period. Derrett says²:

"The shebait ... had obtained through the development of Anglo-Hindu law a definite right of property in his shebaiti, or right to be shebait. This is not surprising since the courts have somewhat naively admitted that the shebait has a right to utilize at his discretion (i.e., for his personal purposes) the surplus after the needs of the idol have been met, and it is entirely in his discretion what these needs amount to".

A shebait's power, as seen above, in dealing with the property of the idol or temple exceeds that of a trustee even. Though in the matter of alienation of property the Privy Council decision¹ affects to show that there was no difference between the powers of a guardian and those of a shebait, the later development in the rights of a shebait undoubtedly

1 Prosunno Kumari Debya v. Golab Chand Baboo (1875) 2 IA 145, 151 (PC).

2 'The reforms of Hindu religious endowments', in D.E. Smith ed., South Asian Politics and Religion, 311, 329.

makes a wide difference between them. The guardian of a minor's estate can hardly utilise the profits of his minor ward's property for his own purpose. So far as the corpus of property is concerned a shebait is 'confined to defensive acts and may not sell the idol's property in the hope, for example, of buying more remunerative property'.¹ In this respect the courts have allowed a little more liberal power to the guardian of a minor's estate².

2. Alienation by natural guardians under the Guardians and Wards Act, 1890

Ever since the decision in Hunoomanpersaud's case the law as settled by that case has been regarded as the basis of the power of alienation of a Hindu minor's estate by his guardians, natural as well as de facto. The GWA did not interfere with the existing rules of personal laws³. Therefore, the principles of the above Privy Council case continued to govern the acts of natural guardians inter alia as before. The persons who were entitled to act as natural guardians under Hindu law continued to be recognised as such. Section 19 of the GWA prohibits the appointment of

1 Derrett, Introduction, 60 para 68; 502 para 795.

2 See infra, 155.

3 Trevelyan, Minors, 151; B.B. Mitra, The Guardians and Wards Act (Calcutta: 11th ed., 1969), 3; M.W. Pradhan, The Guardianship Acts (Bombay: 1958), 105. See also Shooghury Koer v. Boshisht Narain (1867) 8 WR 331 (CR); Heit Singh v. Thakoor Singh (1872) 4 N.-W.P HC Rep 57; Shivji Hasam v. Datu Mavji (1874) 12 Bom HC Rep 281; Amrit Bai v. Manik Bai (1875) 12 Bom HC Rep 79; Ram Chunder Chuckerbutty v. Brojonath Mozumdar (1878) 4 Cal 929; Roshan Singh v. Har Kishan Singh (1881) 3 All 535; Manishankar v. Bai Muli (1888) 12 Bom 686; Honapa v. Mahalpai (1890) 15 Bom 259.

the guardian of the person of a minor whose father is living and is not unfit to act as such guardian, or of a minor married female whose husband is not unfit. The Act does not compel a natural guardian to take out a certificate of guardianship from the court before he can deal with the property of his ward. Section 6 saves the power of a father to appoint a testamentary guardian to his children subject, of course, to the appointed guardian's being removed by the court under section 39.

No section of the GWA specifically contains any law relating to the alienation of a minor's property by his natural or de facto guardian. This indicates that the Legislature assumed in framing the law that their authority would be decided according to the personal law of the minors¹ and judicial precedents thereon. Of the three sections, viz., sections 27-29, which are concerned with the powers and duties of guardians of property, section 27 contains general

¹ From the following suggestion of Mr. Justice Field which the learned judge submitted for framing the Guardians and Wards Bill, it may be gathered that it was the intention of the Legislature to keep the personal laws with respect to natural guardian's power unstated in the Act: "All persons dealing with the property of minors without any certificate obtained from the civil court should be left to the general law applicable to persons of their class and to those transactions into which they may have entered. It would be extremely difficult and, to my mind, dangerous to attempt to reduce to propositions in the form of sections of an Act those principles applicable to Hindus, Muhammadans and other classes in India which regulate the power of dealing with property belonging to minors or in which minors have an interest, in the numerous cases in which questions as to the extent of that power may arise". [The Gazette of India, March 20, 1886 part V, 134-135].

provisions which are applicable to all guardians, natural, testamentary, de facto or certificated, section 28 deals with the provisions regarding the powers of testamentary guardians, and section 29 speaks of the limitation of the powers of guardians appointed or certificated by courts. Therefore alienations by guardians other than those for whom special provisions are made in sections 28 and 29 are to be governed by the provisions of section 27 of the GWA in so far as they are not inconsistent with the personal laws of the minors concerned. Section 27 provides that in the discharge of his duty a guardian must deal with the property as carefully as a man of ordinary prudence would deal with it if it were his own, and the section empowers him to do all acts which are 'reasonable and proper for the realisation, protection and benefit of the property'.

2.1. Test of prudence

This is not for the first time that the guardian of a minor's estate is expected to deal with the estate as carefully as a man of ordinary prudence. Section 16 of Regulation 10 of 1793¹ in a somewhat different wording demanded the manager of a minor's estate to manage it 'diligently and faithfully, for the benefit of the proprietor, and in every respect to act to the best of his judgment

¹ In almost similar language the Bengal Court of Wards Act (Act 9) of 1879, section 40 describes the powers of the manager of a minor's estate.

for the proprietor's interest, in like manner as if the estate were his own'. In Hunoomanpersaud's case their Lordships of the Privy Council observed that an act of a manager or guardian justifying an alienation of a minor's property must be one that a 'prudent owner',¹ would make for the benefit of the estate. The question of prudence of a guardian was raised in Vembu Iyer v. Srinivasa Iyengar² and in his agreement with the contention of the appellant's counsel that the prudence which a man would exercise in the management of his own affairs would not necessarily be sufficient in the administration of the property of a minor, Sundara Aiyar, J., observed that it would not be enough for the court to say that if an adult had acted in the management of his own property in the way in which a guardian dealt with his ward's property, the adult owner's act would not be pronounced as imprudent. The learned judge further observed that there were risks which an owner could take and yet which might be consistent with the conduct of a prudent man, but a trustee or a guardian had no right to take the same risks in dealing with the property of another. In Munayya v. Krishnayya³ Srinivasa Aiyangar, J., found the test of ordinary prudence as too broad, and suggested two limitations on it, viz., first, that no court

1 Hunoomanpersaud's case (1856) 6 MIA 393, 423.

2 (1912) 23 MLJ 638, 643.

3 AIR 1925 Mad 215, 218.

should uphold a transaction which it considered a man of ordinary prudence would not have done in respect of his own property; secondly, the prudence in a particular transaction must be judged in the light of the circumstances which obtained at the date of the action.

In the course of their judgment in Jagat Narain v. Mathura Das¹ the learned judges of the Full Bench gave an explanation of the words 'that a prudent owner would make' used in the judgment of Hunoomanpersaud's case. They observed that their Lordships of the Privy Council did not mean to suggest by these words that "the presence or absence of prudence was to be determined by what the manager chose to say he thought to be prudent, but by what the ordinary man knowing all the facts that were or could properly be within his knowledge at the time the charge was created would consider to be prudent"². They further observed that the prudence of the transaction must not be judged by its result, but in the light of the circumstances which were within the knowledge of the manager, or knowledge of which he could reasonably be expected to have acquired. And further, the degree of prudence required of him in a case where he was not the sole owner of the property but others had interests in that property, would be greater, as in the case of a trustee, than if he were the sole proprietor.

1 AIR 1928 All 454 (FB).

2 Ibid, 456.

In Tajeswar Dutt v. Lakhan Prasad¹ Dawson-Miller, C.J., observed that the guardian of the person and property of a minor was bound to deal with the minor's property as if it were his own and to do everything which was reasonable and proper for the protection and benefit of the property entrusted to him. In Sital Prasad Singh v. Ajablal Mander² Harris, C.J., considered that prudence implied caution as well as foresight and excluded hasty, reckless and arbitrary conduct.

However, the courts should judge an act of a guardian as it would appear to a prudent man at the time when the act was done; and must not set aside the act long after it had been done because it appeared to the court that the guardian could have acted better. It would be just to consider whether in the circumstances that existed at the time of alienation the act would be regarded as a prudent one by men of ordinary prudence in dealing with the property of a minor. And once it is recognised, the court should not invalidate it. The safe and convenient rule is that if the guardian alienates a minor's property because he considers it, after weighing all the then circumstances, to be in the best interest of the minor to make that alienation. The minor would be bound by that act of alienation. Such a view was approved in Gopalakrishna v. Krishna Iyer³ and followed in Dhobani Dei v. Lingaraj

1 AIR 1923 Pat 231.

2 AIR 1939 Pat 370, 372.

3 AIR 1961 Mad 348, 352.

Bhuyan¹. Where the alienation is subject of an executory contract, the prudence for it should be decided according to the circumstances as they were obtaining at the time when the contract was entered into and not when it is executed; subsequent circumstances should not invalidate it.

2.1.1. Dual standard of test

As seen in Jagat Narain's case the amount of prudence required in a particular case depends on the interest of the person in the property he is dealing with. If he is the sole owner of the property, i.e., the only beneficiary of a trust in respect of which he was trustee, the test of prudence would be subjective one; but if he is not the owner or if he is one of the owners the amount of prudence required would be greater than in the case of the first one. He would be required to exercise as much care as a trustee, or in other words the test of prudence would be objective.

In Tulsiram Sitaram v. Narayan Waman² and Nathu Bhiwaji v. Ganpat Bablaji³ little scope was allowed for the exercise of any standard of prudence, since in both the cases the alienees from natural guardians had to show positively that the course which the guardians had adopted was the only one

1 AIR 1971 Ori 224.

2 AIR 1950 Nag 69.

3 AIR 1958 Bom 25.

open to him in the circumstances. Such a view is not correct¹ because a guardian can sell the minor's property for necessity or benefit and such benefit need not be of a defensive character. A power to sell for the benefit of the minor implies a discretion, discretion not merely to decide as to the form of alienation, such as mortgage, sale or lease, but also whether the alienation is at all to be made. The views of these cases were disapproved by a Division Bench of the Madras High Court in Gopalakrishna v. Krishna Iyer² where the learned judges following Vembu Iyer's case observed that the standard of prudence was not a subjective one, i.e., what the guardian would do if the property were his own, but an objective one, i.e., whether in the circumstances it was necessary for the minor or for the benefit of his estate that the property should be sold or otherwise alienated. The learned judges rightly said that the standard of care required would be more akin to that of a trustee than that of an owner. Now, what amount of prudence is a trustee expected to exercise?

In English law a 'trustee is bound to execute the trust with fidelity and reasonable diligence, and ought to conduct its affairs in the same manner as an ordinary prudent man of business would conduct his own affairs;

¹ Derrett, Introduction, 75 para 93.

² AIR 1961 Mad 348.

but beyond this he is not bound to adopt further precautions'¹.

In Re Speight, Speight v. Gaunt² Jessel, M.R., said:

"On general principles a trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own, and that beyond that there is no liability or obligation on the trustee. ... It never could be reasonable to make a trustee adopt further and better precautions than an ordinary prudent man of business in any other way".

Speaking about the standard of care which a trustee would exercise Lindley, L.J., observed in Re Whiteley, Whiteley v. Learoyd³:

"The duty of a trustee is not to take such care only as a prudent man would take if he had only himself to consider; the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide".

The above standards apply not merely to the trustees' power of selecting investments, they apply also to the exercise of their discretionary powers generally. A similar view was expressed by Lord Watson in Learoyd v. Whiteley⁴ when he said:

"As a general rule the law requires of a trustee no higher degree of diligence in the execution

1 Halsbury's laws of England Vol. 38, 969 sec. 1679. See also T. Lewin, The Law of Trusts (London: 16th ed., 1964), 221; W.F. Fratcher, 'Trust', in (1973) 4/11 IECL, 60 sec. 77; Charitable Corporation v. Sutton (1742) 2 Atk 400, 406; 26 ER 642, 645 per Lord Hardwicke, L.C.; Massey v. Banner (1820) 1 Jac & W 241, 247; 37 ER 367, 369; Clough v. Bond (1838) 3 My & Cr 490, 497; 40 ER 1016, 1018.

2 (1882) 22 Ch D 727, 739-40. See also Speight v. Gaunt (1883) 9 AC 1, 29 per Lord Fitzgerald. This case was followed in Re Cassumali (1906) 30 Bom 591, 592.

3 (1886) 33 Ch D 347, 355 (CA).

4 (1887) 12 AC 727, 733 (HL).

of his office than a man of ordinary prudence would exercise in the management of his own private affairs. Yet he is not allowed the same discretion in investing the moneys of the trust as if he were a person sui juris dealing with his own estate. Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard. So, so long as he acts in the honest observance of these limitations, the general rule already stated will apply".

The same standard of diligence and prudence is not applicable to both cases, viz., in a case where the trustee conducts his own business, and another where he conducts the business of others who have moral as well as legal claims upon him. The degree of the standard is different for two different situations. The prudence required in the case of one is to be determined by applying subjective test, while in the case of another it is to be done by the application of the objective test.

In English law there is a controversy between the degree of skill and care to be exercised by a paid trustee and that to be exercised by an unpaid trustee¹. A trustee's duty of skill and care is extremely onerous². Would he be

1 Fratcher, 'Trust', in (1973) 4/11 IECL, 60 sec. 77 f.n. 455.

2 In Knight v. Earl of Plymouth (1747) 1 Dick 120, 126; 21 ER 214, 216 Lord Hardwicke, L.C., observed that when to the onerous nature of the duty of skill and care was added the fact that a trustee was also under a duty to act gratuitously, it appeared that the office of trustee was such that "It is an act of great kindness if anyone to accept it".

put under the same duty of skill and care when he is acting gratuitously? In Jobson v. Palmer¹ Romer, J., held that the same standard should be demanded of a trustee whether he acted gratuitously or received payment. The learned judge observed that a paid trustee who had selected a servant with the same degree of prudence as an ordinary man of business would exercise in his own affairs, was not liable when the servant stole trust property. The traditional view² was the same as decided in Jobson's case. The situation is different where the trustee is an institutional or professional one. An institutional or professional trustee is frequently a banker or actuary who advertises for business, works for pay and has no personal relationship with the settlor; while an unpaid trustee is frequently a personal friend of the settlor. The editors of the 11th and 12th editions of Underhill's Trusts and Trustees observe³:

"(1) ... unpaid trustees are only bound to use such due diligence and care in the management of the estate as men of ordinary prudence and vigilance would use in the management of their own affairs. The mere fact, however, that a trustee has acted under the advice of his counsel or solicitor will not necessarily excuse him, even from paying the costs of the action, where a breach of trust has been committed.

(2) A higher standard of diligence and knowledge is expected from paid trustees".

1 (1893) 1 Ch 71, 76.

2 See Underhill, Trusts and Trustees (10th ed., 1950), 308 Art. 50. In this and earlier editions of this book it is stated: "Nor, on the other hand, does the fact that a trustee is remunerated add to this liability".

3 11th ed., 323-324; 12th ed., 369.

In Re Waterman's Will Trusts¹ Harman, J., expressed a similar view in the following words:

"I do not forget that a paid trustee is expected to exercise a higher standard of diligence and knowledge than an unpaid trustee and that a bank which advertises itself largely in the public press as taking charge of administration is under a special duty".

Some² may expect that the standard of skill and care required of other persons who occupy fiduciary or quasi-fiduciary positions in England is lower and more flexible than that required of a trustee, but a guardian's liability for his minor ward's property, if ever it comes to his hands, does not become less for his being unpaid, for his assuming or being forced to assume the onus. In the management of his ward's property he must use the same care and caution as a man of ordinary prudence would do if it were his own property. If a person appointed as guardian possessed himself of any of his ward's property he became a trustee, although he was only a trustee by construction and not appointed by name³. Every guardian is bound to keep safely the real and personal estate of his ward and to account for the personal estate and the issues and profits of the

1 (1952) 2 All ER 1054, 1055.

2 D.R. Paling, 'The trustee's duty of skill and care', in (1973) 37 (NS) The Conveyancer and Property Lawyer, 48-59, 59 f.n. 46.

3 Sleeman v. Wilson (1871) 13 Eq. Cas 36 per Sir James Bacon, V.-C.

real estate. If he has been guilty of negligence in the keeping or disposition of the minor's money, whereby the estate has incurred loss, he will be obliged to sustain that loss¹. The question remains whether an unpaid, and perhaps unwilling, guardian is liable for failure to show the highest degree of diligence.

Paling² suggests that if the distinction between paid and unpaid trustees would be maintained the law should be:

"(1) A trustee who acts without remuneration shall exercise that degree of skill and care in the management of the trust including the selection of investments which he is accustomed to exercise in the management of his own affairs;

(2) A trustee who receives remuneration shall exercise that degree of skill and care in the management of the trust including the selection of investments which an ordinary prudent man of business would exercise in the management of his own affairs if he were regardful of the pecuniary interests in the future of those having claim upon him".

Such a classification of paid and unpaid trustee is not envisaged by the Indian Trusts Act (Act 2) of 1882, which of course antedates professional trustees. Section 15 of the Act states the care which is required from a trustee. The section runs as follows:

"A trustee is bound to deal with the trust-property as carefully as a man of ordinary prudence would

1 Eversley, Domestic Relations (6th ed., 1951), 437.

2 D.R. Paling, 'The trustee's duty of skill and care', in (1973) 37 (NS) The Conveyancer and Property Lawyer, 48-59, 59.

deal with such property if it were his own; and, in the absence of a contract to the contrary a trustee so dealing is not responsible for the loss, destruction or deterioration of the trust-property".

A guardian of a minor's estate must deal with that estate as 'carefully as a man of ordinary prudence would deal with such property if it were his own', and every plain neglect of duty by him would amount to a breach of trust and he must compensate his ward for any loss occasioned thereby¹. He has all the responsibilities of a trustee². It is not true to say that a minor must take his guardian as he finds him. So long as the guardian acts bona fide in the interests and welfare of the minor and the transactions on behalf of the minor result in benefit to the minor, and so long as the transactions are free from any taint of fraud, malpractice or abuse of power, the yardstick of an ordinary man's conduct in respect of his own property to test the validity of the guardian's transactions can well be applied³. In Nidhi Padhan v. Bhainra Khadia⁴ G.K. Misra, J., clearly pointed out that the standard of prudence required was not a subjective one, but an objective one --- 'a standard more akin to that of a trustee than that of an owner'. This decision was followed by R.N. Misra, J., in Dhobani Dei v. Lingaraj Bhuyan⁵.

1 Trevelyan, Minors, 180 f.n. 2; Labhu Ram v. Bhaq Mal (1920) 54 IC 926; (1919) PR 419.

2 Mathew v. Brise (1851) 14 Beav 341; 51 ER 317.

3 Palani Pillai v. Sengamalathachi AIR 1960 Mad 160, 163.

4 AIR 1963 Ori 133, 135.

5 AIR 1971 Ori 224, 225.

2.2. Fiduciary relationship¹

One who holds anything in trust for another is the fiduciary; and he is said to act in a fiduciary capacity or to receive money or contract a debt in a fiduciary capacity, when the business which he transacts or the money or property which he handles is not his own or for his own benefit but for the benefit of another person as to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other. The fiduciary relation does not depend upon any particular circumstances. It exists in almost every shape. It exists 'notoriously' in the case of trustee and cestui que trust²; it exists in the case of guardian and ward³, parent and child⁴, husband and wife⁵, doctor and patient⁶, solicitor and client⁷.

1 For the general nature of a fiduciary relation see Chitty, Contracts Vol.1 (London: 23rd ed., 1968), 140 sec. 290; Snell, Principles of Equity (London: 27th ed., 1973), 547 ff; Hanbury and Maudsley, Modern Equity (London: 10th ed., 1976), 512-527; Cheshire and Fifoot, Law of Contract (London: 9th ed., 1976), 291 ff; Pollock, Law of Fraud (Calcutta: TLL, 1874), 63 ff. For an illuminating discussion of fiduciary principles in Hindu law see Derrett, 'Fiduciary principles, the African family, and Hindu law', in (1966) 15 ICLQ, 1205-1216.

2 Plowright v. Lambert (1885) 52 LT 646, 652 (NS) per Field, J.; Dougan v. Macpherson (1902) AC 197, 203.

3 Hylton v. Hylton (1754) 2 Ves 547; 28 ER 349; Hatch v. Hatch (1804) 9 Ves 292; 32 ER 615; Maitland v. Irving (1846) 15 Sim 437; 60 ER 688.

4 Archer v. Hudson (1844) 7 Beav 551; 49 ER 1180; Lancashire Loans, Ltd. v. Black (1934) 1 KB 380.

5 Howes v. Bishop (1909) 2 KB 390. This relationship may now be in decay in advanced societies.

6 Dent v. Bennett (1839) 4 My & Cr 269; 41 ER 105.

7 Gibson v. Jeyes (1801) 6 Ves 266; 31 ER 1044.

A guardian stands in a fiduciary relation to his ward; and except as provided by the will or other instrument, if any, by which he was appointed, or by the GWA, he must not make any profit out of his office¹. Being a fiduciary the guardian may not be liable for his failure to make a profit out of the minor's property², but if he himself makes any profit by the purchase of a tenancy under the estate of the minor which is under his management, he may be required to restore the tenancy to the minor, since he would be considered to have gained that advantage by the use of his position and knowledge as fiduciary³. In Hunter v. Atkins⁴ Brougham, L.C., said:

"There are certain relations known to the law, as attorney, guardian, trustee; if a person, standing in these relations to client, ward, or cestui que trust, takes a gift or makes a bargain, the proof lies upon him, that he has dealt with the other party, the client, ward, etc., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing everything to his knowledge which he himself knew. In short, the rule rightly considered is, that the person standing in such relation, must, before he can take a gift, or even enter into a transaction, place himself in exactly the same position as a stranger would have been in, so that he may gain no advantage whatever from his relation to the other party, beyond what may be the natural and unavoidable consequence of kindness arising out of that relation".

1 Indian Trusts Act (Act 2) of 1882, sec. 20(1).

2 T. Lewin, The Law of Trusts (London: 16th ed., 1964), 355-356; Fratcher, 'Tust', in (1973) 4/11 IECL, 74 sec. 92.

3 Gokuldas v. Valibai (1913) 15 Bom LR 343.

4 (1834) 3 My & K 113, 135; 40 ER 43, 52.

A person in a fiduciary position must not be allowed to take advantage of his position, and the court should not allow a person to be placed in a position in which his interest pulls him one way and his duty the other¹.

"Whenever two persons stand in such a relation that while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed"².

A person in a fiduciary relation is under a duty to act for the benefit of another as to matters within the scope of the relation. If the court can discover that some advantage has been taken, some information acquired by one party which the other party did not possess, though that advantage or that information was not to be precisely discovered, and though it was inadequate to go to the length of shocking the confidence of the people, it would go a long way to constitute a fraud. Where a gift bears no proportion to the circumstances of the giver, where no reason appears at all or the reason given is falsified and the giver is

1 Fox v. Mackreth (1791) 2 Cox 320; 30 ER 148.

2 Tate v. Williamson (1866) 2 CA 55, 61 per Lord Chelmsford, L.C. These remarks of Lord Chelmsford, L.C., were adopted by Sir Evershed, M.R., in the Court of Appeal in Tufton v. Sporni (1952) 2 TLR 516, 521-22.

a weak man liable to be imposed upon, the courts look upon such gift with jealous eye and strictly examine the conduct and behaviour of the persons to whom it is made. If the courts see that any undue means have been used by them to procure such gift, or if they see any sort of imposition or that the donor is placed in such a situation as naturally gives the donee an undue influence over him, or if there is the least scintilla of fraud, they will interpose¹.

Being in a fiduciary relation² and his office being a trust³ the validity of a guardian's transactions with his minor ward's property are to be determined by the rules embodied in the Indian Trusts Act (Act 2) of 1882. Section 88 of the said Act provides that where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained. Where, however, any advantage is gained in derogation of

1 Bridgeman v. Green (1757) Wilm 58, 61; 97 ER 22, 24.

2 GWA, 1890, sec. 20(1).

3 Ibid, sec. 39(a)-(c).

the interests of another, by the exercise of undue influence, the person gaining such advantage without consideration, or with notice that such influence has been exercised, must hold the advantage for the benefit of the person whose interests have been so prejudiced¹. Thus where a guardian, by availing himself of his character as such, gains for himself any advantage, or where he enters into dealings under circumstances in which his own interests are, or may be, adverse to those of the ward, and thereby gains for himself an advantage, he must hold the advantage so gained for the benefit of the ward². Again, where he gains an advantage in derogation of the minor ward's interests by the exercise of undue influence, he or any person who has the notice of the exercise of such influence must hold the advantage for the benefit of the ward so prejudiced. Section 53 of the Trusts Act of 1882 prohibits a trustee or any person who has recently ceased to be a trustee from buying, or becoming mortgagee or lessee of the trust property or any part thereof without the permission of the court. The court would not give such permission unless the proposed purchase, mortgage or lease is manifestly for the advantage of the beneficiary. Further, where a trustee's duty is to buy or obtain a mortgage or lease of particular property for the beneficiary such trustee

1 Indian Trusts Act, 1882, sec. 89.

2 Ibid, sec. 88, illustration (h).

must not buy it, or any part thereof, or obtain a mortgage or lease of it, or any part thereof for himself. So also a guardian must not alienate to himself or obtain anything belonging to a minor without the permission of the court.

'Undue influence'¹ has been defined in section 16 of the Contract Act (Act 9) of 1872. The section runs as follows:

"(1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another ---

- (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or
- (b) where he makes a contract with a person whose mental capacity is temporarily affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872".

¹ For a general discussion on undue influence see Halsbury's laws of England Vol. 17, 672 ff; Hanbury and Maudsley, Modern Equity (10th ed.), 627-630; Keeton and Sheridan, The Law of Trusts (London: 10th ed., 1974), 120 ff.

The main ingredients of undue influence are that one of the parties should be in a position to dominate the will of another and that he should use that position to obtain an unfair advantage over the other. A person is deemed to be in a position to dominate the will of another (i) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or (ii) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress. Commenting on the origin of the doctrine of undue influence Shah, J., observes¹ that under the Common law this doctrine was evolved by the courts in England for granting protection against transactions procured by the exercise of insidious forms of influence spiritual and temporal. 'The doctrine applies to acts of bounty as well as other transactions in which one party by exercising his position of dominance obtains an unfair advantage over another. The Indian enactment is founded substantially on the rules of English Common law'. The learned judge says that the first sub-section of section 16 lays down the principle in general terms; sub-section (2) raises the presumption that a person shall be deemed to be in a position to dominate the will of another if the conditions set out therein are fulfilled; and sub-section (3) lays down the conditions

¹ Ladli Parshad v. Karnal Distillery Co. AIR 1963 SC 1279, 1290.

for raising a rebuttable presumption that a transaction is procured by the exercise of undue influence.

The doctrine of undue influence was intended to ensure that no person should be allowed to retain the benefit of his own fraud or wrongful act. It applies to all cases where influence is acquired and abused, where confidence is reposed and betrayed¹. Cotton, L.J., has classified such cases as follows²:

"First, where the court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justify the court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the court interferes, not on the ground that any wrongful act has been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused".

But it must be admitted that the principles of undue influence apply with great difficulty to a case where a guardian benefits from the use of his ward's assets up till

1 Smith v. Kay (1859) 7 HLC 750, 779; 11 ER 299; Subhas Chandra v. Ganga Prosad (1967) 1 SCR 331, 336 per Mitter, J.

2 Allcard v. Skinner (1887) 36 Ch D 145, 171.

the settling of accounts upon the ward's majority; suits by ex-wards against their former guardians on the account are very rare and the reasons for this are obvious.

Although most of the cases in which undue influence has been successfully pleaded against acts by persons sui juris relate to gifts, the same principles apply to purchases at an undervalue or sales at an excessive price¹. The difference between a gift and a manifestly disadvantageous contract is for this purpose only a matter of degree². We are concerned particularly with a guardian's alienations and the subtlety of the situation is manifest.

Since a guardian is in a fiduciary position when his interests conflict with those of his ward, he must see that the ward is provided with proper and independent advice and assistance³. In dealing with transactions resulting through fiduciary relationship the principles followed by courts of equity⁴ and the rules embodied in the Trusts Act of 1882 are to be applied⁵ however repugnant this may be to Asian habits of mind. Thus a transaction between a guardian and his ward would be looked upon by the courts with jealousy, and before upholding it they will require 'the clearest

1 Tufton v. Spelni (1952) 2 TLR 516, 526.

2 Pollock, Principles of Contract (London: 13th ed., 1950), 482.

3 Rhodes v. Bate (1866) 1 CA 252, 257.

4 Poushong v. Moonia (1868) 10 WR 128, 129 (CR); Roopnarain Singh v. Gugadhur Pershad (1868) 9 WR 297 (CR).

5 Re Cassumali (1906) 30 Bom 591, 592; Labhu Ram v. Bhag Mal (1919) PR 419; Ramdin Hazari v. Manasaram Murlidhur (1929) 51 All 1027; Kishandas v. Godavaribai AIR 1937 Bom 334.

proof of good faith and fairness, absence of influence, knowledge by the ward of the facts and of his rights, and benefit to the ward'¹.

Section 20(2) of the GWA states:

"The fiduciary relation of a guardian to his ward extends to and affects purchases by the guardian of the property of the ward, and by the ward of the property of the guardian, immediately or soon after the ward has ceased to be a minor, and generally all transactions between them while the influence of the guardian still lasts or is recent".

Where a man acts as guardian of a minor, the courts are extremely watchful to prevent that person's taking any advantage immediately upon his ward coming of age². If, as a result of direct pressure, a young man only six months after he had attained majority, executes a document it is not sufficient that he knew what the actual transaction was. It must be shown that he was emancipated from control and had the advantage of a separate solicitor. In the absence of any such proof the document must be set aside³. On grounds of public policy even after a great lapse of time a conveyance by a ward to her guardian may be set aside unless the act is, on rational consideration, an 'act of pure volition, uninfluenced by anybody'⁴. If a guardian who is also the uncle of the ward procures the guarantee of his young niece

1 Toolseydas v. Premji Tricumdas (1888) 13 Bom 61, 66; Thataiah v. Venkata Subbaiah AIR 1968 SC 1332, 1335.

2 Derrett, Introduction, 89-90 para 117; see also Hylton v. Hylton (1754) 2 Ves 547, 548; 28 ER 349, 350.

3 Sercombe v. Sanders (1865) 34 Beav 382, 386; 55 ER 682, 683.

4 Hatch v. Hatch (1804) 9 Ves 292; 32 ER 615.

who is possessed of considerable property and who lives with him, for the fulfilment of his contract with his creditors, the guarantee is considered as procured by undue influence¹. A guardian is duty-bound to abstain from entering into any arrangement beneficial to himself and detrimental to the minor's estate², but if he takes a conveyance from the minor in consideration of an alleged debt incurred for a grossly extravagant expenditure, the conveyance will be set aside³.

Release of his share by a member of a joint Hindu family executed immediately after his attaining majority in favour of his guardian is also looked upon with suspicion. Thus where there was a dispute between the guardian and his ward about their respective rights to the estate of a deceased person and as to the genuineness and validity of a will alleged by the guardian to be the will of the deceased, and the guardian without giving an opportunity to the ward of testing the validity or the real meaning of the will by an independent advice, obtained a release from the minor soon after he attained majority and the ward in consideration of receipt of a certain sum of money agreed to give up all claim to any share in the estate of the deceased and undertook not to challenge the release at any time thereafter, it was held that the transaction was not of that absolute fairness and good faith as required by

1 Maitland v. Irving (1846) 15 Sim 437; 60 ER 688.

2 Prosunno Coomar v. Wooma Churn (1873) 20 WR 274 (CR).

3 Lachman Das v. Rup Chand (1831) 5 Sel. Rep (Beng) 136 (NE);
Baboo Ram v. Kalee Pershad (1825) 4 Sel. Rep (Beng) 22 (NE).

the relation of the parties and ought to be set aside¹. In such a case it is for the guardian to show that he derived no benefit from the transaction, that he placed the ward in full possession of all facts and accounts relating to the estate, and explained to him the full extent of his rights therein. Again, where an ignorant young man who has just attained majority and whose mind is clouded and affected by hemp smoking, has been deprived of his property by his guru who has complete control over him, the transaction being for an inadequate consideration, is set aside on the ground of undue influence².

In Gillon v. Mitford³ where a minor executed a release for a comparatively inadequate consideration to his guardian soon after coming of age, Thomas Strange, C.J., said referring to a number of English cases⁴ that the principles of equity which govern the case of a release "are those which render it the duty of the court, wherever a man appears to have been acting as guardian, or as trustee in the nature of guardian to a minor, to see, when he comes to give up his trust, that a fair account has been rendered, and that his release, if he have obtained one, has been fair. They operate in other relations beside that of guardian and ward; and, in their application, are always

1 Toolseydas v. Premji Tricumdas (1888) 13 Bom 61.

2 Mt. Manbhari v. Sri Ram AIR 1936 All 672.

3 (1808) 1 Strange 281, 287-88; 5 ID 149, 152 (OS).

4 Hylton v. Hylton (1754) 2 Ves 547; 28 ER 349; Hatch v. Hatch (1804) 9 Ves 292; 32 ER 615; Morse v. Royal (1806) 12 Ves 355; 33 ER 134; Osmond v. Fitzroy (1731) 3 P. Wms 129; 24 ER 997.

considered, not as ordinary principles, regulating rights, and as such, liable to be modified by a variety of personal circumstances, but as principles of policy to be enforced for the sake of the public, as affording by their efficacy a salutary and important protection, where protection is peculiarly needed, and, without the influence of which, great imposition might be practised, and incalculable injustice done. For this reason, their application does not depend upon detection of positive unfairness in the arrangement proposed to be impeached. If it confer an advantage upon the guardian, it may be one that he may have merited; but, upon the principles of the court, it may not be the less bound to set it aside. Neither does it depend upon its appearing whether the minor just come of age knew at the time in its full extent what it was that he was giving up, and was apprised of his option to withhold his consent. In ordinary cases, a man will be bound by his release, if there appear to have been a consideration for it, and that, knowing at the time the extent of his rights, he was aware of the nature of the instrument he was about to execute. But, I apprehend, it is different between a guardian and ward, at the critical moment of settling the account, upon the latter coming of age. At law, the relation may have ceased, the minor having become legally sui juris. But an influence for the most part on the side of the guardian still continuing, equity presumes its operation, and will not permit him at that moment, in the act of settling the account, to deprive an

important advantage, for which he could not have stipulated; much less if it be more than doubtful, whether the ward was informed at the time of the extent to which he was entitled to call him to account, and whether he possessed advice to satisfy the court that he was not misled in releasing him".

The learned Chief Justice has put greater fidelity and burden of integrity on a guardian than any other conceivable fiduciary. The guardian must give a fair account of the minor's property when his guardianship terminates or when he gives it up, and if he obtains any release from the minor that must be fair beyond doubt. As a matter of public policy the principles of equity do not depend for their application in cases of imposition or influence upon the detection of positive unfairness in any alleged transaction. If a transaction confers an advantage upon the guardian, the court must set it aside; the fact that the minor who has just come of age knew at the time of effecting the transaction its nature, character and extent, and his right to withhold his consent to it, would not be a defence to an action for setting it aside. In ordinary cases a man is bound by his release if he gets adequate consideration for it and if he knew at the time of the execution of the instrument the extent of his rights and the nature of the instrument. But the situation is different when it obtains between a guardian and ward upon the latter coming of age. The court will presume the continuance of the guardian's

influence and watch with jealousy any transaction between them. This notional extension of undue influence may not be so effective in the case of other fiduciary relations where minority or the recent termination of the minority of the weaker party is not involved. In Coles v. Trecothick¹ Lord Eldon says that a trustee may buy from the cestui que trust, if there is a distinct and clear contract, 'ascertained to be such after a jealous and scrupulous examination of all the circumstances, that the cestui que trust intended the trustee should buy; and there is no fraud, no concealment, no advantage taken, by the trustee of information acquired by him in the character of trustee'.

A transaction between a ward and his guardian or another person standing in loco parentis to her, two months after she came of age, could be set aside even against a third person, if he took a benefit knowing the nature of the circumstances; but where there was no ground for imputing to him knowledge of undue influence it would be otherwise². However the courts would not set aside transactions in the nature of a family arrangement³ between a guardian and his ward. Family arrangements which are advantageous for the ward's family generally are looked upon with favour

1 (1804) 9 Ves 234, 246; 32 ER 592, 597.

2 Archer v. Hudson (1844) 7 Beav 551; 49 ER 1180.

3 For the nature and utility of family arrangements see Derrett, Critique, 281-286 paras 360-366; the same, 'Family arrangements', in (1968) 70 Bom LR (Jour), 1-16; Derrett's views are judicially accepted and applied in Kalhabai v. Kausalyabai (1969) Mah LJ 16 (NC No. 28); see also Paras Diwan, Hindu law, 262-63; Sahu Madho Das v. Mukand Ram AIR

Kale v. Dy. Director of Consolidation AIR 1976 SC 807; K.V. Narayanan v. K.V. Ranganadhan AIR 1976 SC 1715; and cf. Ratnam Chettiar v. S.M. Kuppuswami AIR 1976 SC 1.

by the courts, and they will not, as in the case of ordinary releases executed by a ward to his guardian or other transactions between them soon after the ward has attained majority, raise any presumption of undue influence¹.

2.2.1. Burden of proving undue influence

If a transaction appears to be unconscionable, the burden of proving that it was not influenced by undue influence lies upon the person who was in a position to dominate the will of the other. Sir John Romilly observes²:

"Whenever one person obtains, by voluntary donation, a large pecuniary benefit from another, the burthen of proving that the transaction is righteous, to use the expression of Lord Eldon, in Gibson v. Jeyes [(1801) 6 Ves 266; 31 ER 1044], falls on the person taking the benefit. But this proof is given, if it be shown that the donor and donee were so situated towards each other, that undue influence might have been exercised by the donee over the donor, then a new consideration is added, and the question is not, to use the words of Lord Eldon in Huquenin v. Baseley [(1807) 14 Ves 273; 33 ER 526] 'whether the donor knew what he was doing, but how the intention was produced'; and though the donor was well aware of what he did, yet if his disposition to do it was produced by undue influence, the transaction would be set aside".

Approving the test of Huquenin's case Lord Evershed, M.R., observed in Zamet v. Hyman³ that where a transaction appeared on its face to be much more favourable to one party than to the other, the court could, in the circumstances of the case, find that a fiduciary relationship

1 Trevelyan, Minors, 123.

2 Houghton v. Houghton (1852) 15 Beav 278; 51 ER 553.

3 (1961) 3 All ER 933, 938 (CA).

existed such as to cast an onus on the party benefited to prove, in order to stand the transaction, that it was completed by the other party after full, free and informed thought about it. In Espey v. Lake¹ it was found that if there was a relation which gave rise to confidence between the parties and if the person in fiduciary position obtained an advantage, the court would give relief to the party conferring the benefit, unless the other party could show that he did not avail himself of the confidence which subsisted between the parties. The burden was therefore upon him and, if he did not discharge the burden, the plaintiff would succeed. When there was a third party involved, the position was not dissimilar. If it was shown that he was aware of the existence of such confidential or fiduciary relation, he was under the same disability as the party who occupied the position of confidence. It was enough that the third party was aware of the existence of the confidential relation and the courts would not insist on the proof that he was further aware of the actual exercise of undue influence².

Section 16(3) of the Contract Act of 1872 provides that the burden of proving the undue influence in a contract of unequal parties lies with the dominant party and that that section is not a bar to the application of section 111 of

1 (1852) 10 Hare 260; 68 ER 923.

2 Narayana Doss Balakrishna Doss v. Buchraj Chordi Sowcar (1927) 53 MLJ 842.

the Indian Evidence Act (Act 1) of 1872. Section 111 runs as follows:

"Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence".

The law contained in the above section has no application to those who are not in a fiduciary relation to the person who has recently attained majority¹; and undue influence contained in section 16 of the Contract Act cannot be presumed unless the parties are or were in a fiduciary relation to each other, or in a mentally unequal situation. The two sections are equally applicable whether a parent or any other person is guardian.

2.3. Alienation for realization, protection or benefit of a minor's estate

In discussing the restrictions on the powers of a natural guardian to alienate his ward's property Trevelyan observes²:

"Although the appointment of a guardian by the court supersedes the powers of a natural and testamentary guardians, the powers of a natural guardian in the absence of such appointment are unaffected by the restrictions which the Guardians and Wards Act places upon the powers of guardians appointed by the court. The validity of his acts must be determined by the general principles which govern the relations of a minor to the manager of his estate, or, in the words

1 Rajcoomer Roy v. Alfuzuddin Ahmed (1881) 8 CLR 419.

2 Minors, 151. These observations were approvingly quoted in Lakhmichand Isardas v. Firm of Khushaldas Mangataram AIR 1925 Sind 330, 339-40.

of the Guardians and Wards Act, he may do all acts which are reasonable and proper for the realization, protection, or benefit of the property".

The natural guardian has all the powers which the manager of a minor's estate has in relation to the estate of the minor. His dealings with the minor's property would be justified provided they are according to the dual principles of Hunoomanpersaud's case. Derrett rightly observes¹ that the words realization, protection, or benefit of the minor's estate would cover all types of motive and that when they are read with the words 'necessary or reasonable and proper' they constitute a guardian's charter.

A guardian has all the responsibilities of a trustee²; he must not do anything to the prejudice of his ward³. All his acts which are strictly within his powers, and done in good faith⁴, and which are such as the minor might, if of age, prudently do for himself, bind the minor and his estate⁵. In the exercise of his powers he must not practise any fraud ; if he does it will invalidate a sale or any other dealing affecting the minor's property which may be otherwise unimpeachable⁶. Section 17 of the Contract Act

1 Derrett, Introduction, 72 para 88.

2 Mathew v. Brise (1851) 14 Beav 341; 51 ER 317.

3 Dambar Singh v. Jawitri Kunwar (1907) 29 All 292.

4 Gireewur Singh v. Muddun Lall Doss (1871) 16 WR 252 (CR).

5 Temmakal v. Subbammal (1864) 2 Mad HC Rep 47.

6 Bunseedhur v. Bindeseree Dutt (1866) 10 MIA 454; Brojo Kanto Das v. Tufaun Das (1899) 4 CWN 287.

defines fraud as follows:

"'Fraud' means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:-

- (1) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;
- (2) the active concealment of a fact by one having knowledge or belief of the fact;
- (3) a promise made without any intention of performing it;
- (4) any other act fitted to deceive;
- (5) any such act or omission as the law specially declares to be fraudulent.

Explanation:- Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech".

Again, section 25 of the Penal Code (Act 45) of 1860 states that a person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise. The guardian will not be excused for a criminal breach of trust even if the ward acquiesces to it¹. Where he dishonestly² misappropriates or converts the property of his ward to his own use he will be liable to be punished for criminal breach of trust under sections 405 and 406 of the Penal Code. Section 405 states:

"Whoever, being in the manner entrusted with property, or with any dominion over property, dis-

1 Wilkinson v. Parry (1828) 4 Russ 272; 38 ER 808.

2 'Dishonestly' has been defined in section 24 of the Penal Code as follows: "Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing 'dishonestly'".

honestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he was made touching the discharge of trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'".

And section 406 states:

"Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both".

2.3.1. Pressure necessary for alienation

All circumstances of pressure which render the raising of money necessary for the protection or preservation of a minor's estate or for his personal well-being would support an alienation of the minor's property. In determining whether an alienation for the minor's or his family necessity would be justifiable¹ or whether a sale or mortgage would be appropriate in a particular case², a reasonable latitude should be allowed for the exercise of the guardian's judgment. This does not, however, mean that the persons dealing with him are not required to take any precaution. Markby observes³:

"He who deals with the representative of another must know that it is the duty of the representative to act in all things to the best of his ability for the benefit of his principal, and if the circumstances be such that a reasonable

1 Babaji Mahadaji v. Krishnaji Devji (1878) 2 Bom 666;
Nagammal v. Varada Kandan AIR 1950 Mad 606.

2 Krishnarajan v. Doraswamy AIR 1966 Ker 305.

3 William Markby, Lectures on Indian Law (Calcutta: 1873), 81.

man ought to suspect that the representative was not so acting, he is bound to abstain dealing further with the representative, until the suspicion is removed. No one is at liberty to deal with a representative whose conduct he doubts. The party dealing with the representative is not the judge of what is or is not for the benefit of the principal, but he must cease to act as soon as he has reason to believe that the representative is acting improperly. This is a general principle of the law of representation, and applies as much to the certificate-holder representing a minor as to any other representative".

A guardian must have regard to the interest of the minor's inheritance, and not merely to its immediate income¹. Where the minor's estate is encumbered or where there are debts for which his estate would be liable, the guardian should endeavour to pay off such debts by strict economy out of the income of the estate, and if it does not cover, by the sale of a part of the estate. Actual pressure in the sense of immediate demand by the mortgagee is not conclusive of the question of necessity. Where there are other circumstances present which show that though there is no immediate pressure for repayment, there are no other means or way of paying off the antecedent debts including the mortgage debt of the deceased, even after the expiry of the specified period, it is not necessary for the sale to be binding on the sons that the purchaser should show that there was no alternative for the vendor but to sell the property. Thus where the father executed a usufructuary mortgage, redeemable after a specified

1 Sutton v. Jones (1809) 15 Ves 584, 588; 33 ER 875, 877.

period of time, to secure a debt and, on his death, the mother as guardian of the minor sons sells the charged property for discharging that mortgage even before the expiry of the stipulated period, the sons will be bound by the sale¹. The sale cannot be invalidated on the ground that it was effected at a time when there was no necessity for such sale².

2.3.2. Sale by natural guardians

The natural guardian of a minor may alienate or encumber the whole or any part of the minor's property for legal necessity³, although he has no such power to sell the undivided interest of a minor coparcener of a joint family even for necessity or for benefit unless he is also manager of the family⁴. He may sell the minor's property for the payment of the latter's ancestral debts, and such payment does not require any actual pressure at the time in the shape of a suit on the minor's property. It would be sufficient if the courts find that such debts exist and the sale is a bona fide one to meet such debts⁵. It is not necessary that there should be a demand by the creditor⁶. In some cases the payment of a minor's ancestral debts is not considered to be a necessity creating sufficient

1 Kesavalu Naidu v. Nagarathnam AIR 1964 Mad 374, 375.

2 Babaji Mahadaji v. Krishnaji Devji (1878) 2 Bom 666.

3 Nagalinga v. Chinamma AIR 1950 Trav-Co 30, 31 (FB); Haranarain v. Moolchand AIR 1955 NUC (Raj) 4649; Chunilal Kanji v. Bhanji Kanji AIR 1955 NUC (Sau) 1452; Keluni Dei v. Kanhei Sahu AIR 1972 Ori 28, 30-31.

4 Venkatakrishna Reddy v. Amarababu (1971) 2 MLJ 461.

5 Kaihur Singh v. Roop Singh (1871) 3 N.-W.P. HC Rep 4.

6 Vembu Iyer v. Srinivasa Iyengar (1912) 23 MLJ 638, 645.

pressure to justify an alienation of a minor's property, or even if it is considered to be a pious duty of the minor to pay such debts, proof of strict necessity is demanded from the transferees for their payment. In Dharmaraj Singh v. Chandrasekhar Rao¹ the majority view was that a non-father manager of a joint Hindu family could alienate a minor's share to satisfy an antecedent debt of the minor's father binding on the minor if it was established by the transferee that in the circumstances in which the family was placed there was no other reasonable course open to the guardian. Similarly in Tulsiram Sitaram v. Narayan Waman² where the mother of a Hindu minor alienated the minor's property for paying the debts binding upon the minor, Mudholkar, J., held that the question whether the sale was justified or not depended upon whether the danger to be averted or the pressure of circumstances was such as to leave no other alternative but to effect a sale. The same learned judge held in Nathu Bhiwaji v. Ganpat Bablaji³ that where the mother of a minor alienated his share to satisfy an antecedent debt of the son's father the transferee had to show positively that the course which the natural guardian took was the only one open to her in the circumstances of the family, and that if he failed to do so the transaction could not be upheld.

1 AIR 1942 Nag 66.

2 AIR 1950 Nag 69.

3 AIR 1958 Bom 25.

Besides strict necessity, some courts consider the ethical aspect of the payment of ancestral debts. Thus in Sudhanya Kumar v. Haripada¹ the Calcutta High Court held that a guardian should be concerned with the material benefit and not with the spiritual benefit of the minor, and that a guardian was not given the authority to sacrifice the material resources of the minor to acquire spiritual benefit to the minor. So also an alienation to fulfil the cherished desire of a deceased ancestor was not considered by the same High Court to be a valid transaction by a natural guardian in Commissioner of Agricultural I. T. v. Jagadish Chandra Sahoo². In Re Lalitha Bai³ the Madras High Court observed that a guardian administering the estate of a minor should not alienate the minor's estate on the ground of conferring spiritual benefit or bliss upon the minor. In his judgment of the said case Jagadisan, J., reminded the court of its duty and sounded a warning in the following words⁴:

"The court should not be swayed by considerations of propriety or the meritorious nature of the object of the expenses, as the court in which the property is vested and which is acting through the medium of its manager, or delegate, the property guardian, owes a duty to the minor wards to administer the estate in accordance with the law of the territory. ... the court has no power to sanction an ex gratia payment from out of the minors' estate even for the marriage of the minors' sister".

It is to be observed that in cases requiring the proof of strict necessity the courts showed an unexpressed

1 AIR 1960 Cal 34.

2 (1961) 1 Cal 379.

3 AIR 1961 Mad 153.

4 Ibid, 158.

sympathy for the minors, since in all the cases the minors were favoured. The courts did not consider the interests of the alienees; on the contrary, they put unusual obligation on them. As regards the duty of an alienee Derrett says¹:

"To protect himself fully the alienee must show that he satisfied himself that the course proposed to be adopted by the guardian was necessary and proper and that no alternative which would involve less loss to the minor was open to the guardian. ... Where the alienee was protected in the manner described above he need not prove that the money he advanced was actually used for the purposes alleged by the guardian, since his protection rested upon the equitable claim of a bona fide purchaser for value without notice of the defect in the guardian's power".

The reasoning of the learned judges in cases in which moral aspect of the payment of ancestral debts was considered sounds nice and it reminds us of the sastric law that a minor need not pay his ancestral debts until after the attainment of his majority. But it may have an adverse effect on the price of land in the case of sale or on the availability of a good lender to an old parent in the case of mortgage. Commenting on such views Derrett observes²:

"The view that the guardian might not sell unless there was no alternative open to him, a view which left prudent man's judgment very little room, was probably unsound. The method to be followed was the guardian to choose; and simple debts would bind the minor's estate ... as effectively as mortgages. But in each case the necessity must exist ... both for the loan and for the rate of interest agreed upon. But imprudent and speculative transactions remained invalid upon any view of the matter".

1 Introduction, 75-76 para 93.

2 Ibid, 76-77 para 95.

If a guardian has at his disposal large resources, he cannot borrow to pay land revenue; and the minor's estate will not be bound by any bond executed for any loan¹. If a guardian fails to mention himself in the sale deed as the guardian of the minor, it would not affect the sale if it appears clearly from the deed that it is the minor's property which forms the subject of sale², and for this purpose in each case the language of the deed and the circumstances in which it was executed have to be considered³. In Rangaswami v. Marappa⁴ the question arose whether a minor could be held to be a party to a deed of transfer which did not contain the minor's name, and whether the transfer made thereunder was on the minor's behalf. Venkatarama Aiyar, J., sitting alone, reviewed a wide range of cases on the point and held that an alienation of a minor's property would not be binding on him unless he was a party thereto⁵. If his name was disclosed in the body of the document he must be held to be a party thereto notwithstanding any error or defect in description⁶. If his name was not disclosed, it could not be said that the transfer was made on behalf of the minor. If, however, a guardian alienates the property of a minor under an assertion of a hostile title, the transfer cannot be regarded as one made by a guardian and it would

1 Ganpat Rao v. Ishwar Singh AIR 1938 Nag 476, 479.

2 Makundi v. Sarabsukh (1884) 6 All 417 following Judoonath Chuckerbutty v. James Tweedie (1869) 11 WR 20 (CR); Murari v. Tayana (1895) 20 Bom 286, the authority of the decision in this case was doubted in Margaret Lornie v. Abu Backer Sait (1939) 1 MLJ 664.

3 Seth Ghasiram v. Mt. Binia (1904) Nag LR 66; Chhaju Mal v. Multan Singh AIR 1936 Lah 996.

4 AIR 1953 Mad 231, 233.

5 Ammani Ammal v. Ramaswami Naidu (1919) 37 MLJ 113.

6 Watson & Co. v. Sham Lal Mitter (1887) 14 IA 178 (PC).

be treated as void¹. The guardian of a minor has no power to fritter away the minor's property or to enforce the sale of the minor's property. Therefore, if a guardian builds houses on his minor ward's land with money taken partly out of the minor's funds and partly by borrowing on the security of the land, and if the minor brings a suit for the settlement of accounts and for possession of the land after demolition of the houses, the court cannot ask the defendant to remain in possession of the houses on the minor's land and pay a certain ground rent to the minor².

If a guardian sells the property of his minor ward for a reasonable price and if there is legal necessity for the purchase money the sale may be held valid. In Munayya v. Krishnayya³ Spencer and Srinivasa Aiyangar, JJ., did not consider it an improvident transaction when a minor's guardian sold the minor's property for a reasonable price and there was legal necessity for half the purchase money in the shape of discharging a loan borrowed by the minor's father. The remaining half of the price was allowed to remain with the purchaser subject to the condition that the minor on attaining majority should get it with interest at 6 per cent per annum on a promissory note taken from the purchaser for this. Adequacy of consideration is a relevant

1 Ram Tuhul Singh v. Bisseswar Lal Sahoo (1875) 2 IA 131, 143 (PC); Nathu v. Balwant Rao (1903) 27 Bom 390; Balwant Singh v. Clancy (1912) 34 All 296; Nandan Prasad v. Abdul Aziz (1923) 45 All 497; Rangaswami v. Marappa AIR 1953 Mad 230, 233.

2 Thakar Das v. Narainu AIR 1928 Lah 90, 91.

3 AIR 1925 Mad 215, 217.

factor in judging whether an alienation is prudent; and in appropriate cases the disposal of even the entire property may be justifiable and binding if the property was not sacrificed for an inadequate price and if the consideration was calculated to relieve the necessity for which the disposition was made¹. If the sale price is not totally disproportionate to the value of the property, i.e., if it does not amount to an improvident act on the part of the guardian, the sale would be binding on the minor if otherwise supported by legal necessity and could not be set aside². Where a sale was effected and with the sale price debts were paid, certain lands were redeemed from mortgage charge, and some property was acquired in the name of the minor, the sale could not be said to be a wasteful act; on the contrary, it should be regarded as an act of a prudent man³.

What amount of the purchase money may be said to have legal necessity with respect to the sale of a minor's property by his guardian? Sitting with Ray, C.J., in Manglu Meher v. Sukru Meher⁴ Jagannadhadas, J., observed that in the case of an alienation of a minor's property by his guardian by way of sale it was not necessary to prove that every portion of the consideration was required for legal

1 Krishnarajan v. Doraswamy AIR 1966 Ker 305.

2 Soshil Kumar v. Seth Madan Gopal AIR 1953 Punj 292, 293.

3 Sham Singh v. Ranjit Singh (1968) 70 PLR 1134, 1136 following Chiragh v. Fatta AIR 1934 Lah 542.

4 AIR 1950 Ori 217, 220.

necessity, or that inquiry as to necessity had been made out in respect of that portion not covered by legal necessity. The learned judge considered that what needed to be judged broadly was whether for raising the amount for which legal necessity had been made out, the particular transaction was in fact reasonably necessary and prudent, or whether the alienees were reasonably and honestly satisfied that it was so on a bona fide inquiry. It is, no doubt, true that the necessity for the amount needed for liquidating a claim cannot be decided by merely taking into account the arithmetical proportion between that portion of the amount which was for necessary purpose and that which was not¹. But if it implies that a guardian of a minor's estate will have the same power as that of the manager of a joint Hindu family consisting of minor coparceners in respect of alienating property, it would ignore an important difference which is maintained, despite the equating decision of the Privy Council in Hunoomanpersaud's case, between them in respect of rendering accounts, and it would give a guardian power which as a trustee he may not have. The manager of a joint family being one of the co-owners has, in fact, greater power in alienating the family property including the interests of the minor members therein² than the guardian of a minor's estate wherein he has no ownership. As said earlier, the positions of a manager and a guardian are not alike³. By the very

1 Gopalakrishna v. Krishna Iyer AIR 1961 Mad 348, 351.

2 In strict sense a manager is not a trustee. See Derrett, Introduction, 262 para 426. He is not bound to render accounts. See Mayne, Hindu law (10th ed.), 384-85. See also Abhaychandra v. Pyari Mohun (1870) 5 BLR 347; Ramanathan v. Narayan AIR 1955 Mad 629.

3 See also Mir Sarwarjan v. Fakhruddin Mahomed (1911) 39 IA 1.

nature of things, a manager of a joint Hindu family exercises very wide powers; and so long as he acts honestly, he can do anything, he can manage or mismanage the affairs of the family, he may give more to one member and less to another, he may spend more on himself and less on others¹. The powers of a guardian are certainly not so wide. Although the validity of a manager's alienation of joint family property demands that he has acted, similar to the guardian of a minor's estate, for the legal necessity or benefit of the estate, his sui generis position in the family gives him the privilege not to give any account, amongst others, of the balance of purchase money that remains of a particular alienation at his hands after meeting the necessity for which the transaction was made. If a sale made by the manager of a joint family is for an adequate consideration, and the purchaser made inquiry as to the necessity of the sale, and a major portion of the purchase money is applied to meet the necessity, the sale would not be set aside. Would the same be allowed in the case of a minor's guardian? Should he not give account of the balance money that remains with him after meeting the necessity in a particular transaction? A guardian being the trustee of his minor ward's property must render accounts of the surplus money² and invest it in approved securities³. He must give account of the

1 Derrett, Introduction, 262 para 426; Paras Diwan, 'Powers of the guardian of the minor's property under Hindu law' in (1963) 15/2 Law Review, 142-201, 165.

2 Section 19, Trusts Act, 1882.

3 Section 20, Trusts Act, 1882.

balance money; and if used unauthorisedly, he must make good the loss of the minor; such is the equitable principle¹. Therefore, in the case of a guardian's alienation of a minor's property, in addition to the question whether the sale itself was one which was justified by legal necessity, the court should see whether the minor's money was justly and securely invested for the benefit of the minor or his estate. In a suit by a minor either during his minority or after attainment of his majority for setting aside an alienation made by his guardian if the courts look to the legal necessity of the transaction as a whole only and not to the application of the purchase money much scope would be allowed to a guardian for the misuse of a minor's money. The latitude which is said earlier to be allowed to a guardian in relation to the alienation of a minor's property does not mean that he should waste the minor's property. The guardian must have bona fide intention to protect the minor's property. In its investment he must take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide. The bona fides of a guardian could not be ascertained unless the application of the purchase money is seen. The cases² on which the

1 Hanbury and Maudsley, Modern Equity (10th ed.), 468.

2 Sri Kishun Das v. Nathu Ram AIR 1927 PC 37 [sale of ancestral property by the father for the payment of his debts]; Niamat Rai v. Din Dayal AIR 1927 PC 121 [sale by the managing member for discharging family debts]; Suraj Bhan Singh v. Sah Chain Sukh AIR 1927 PC 244 [sale by a widow of her widow's estate].

learned judges in Manqlu Meher's case relied are either regarding the power of a manager in respect to the alienation of the joint family property or that of a widow in respect to her widow's estate. In either case the alienor was the owner or one of the owners of the property. The decision in Manqlu Meher's case cannot be taken to have laid down an acceptable proportional legal necessity of the alienation of a minor's property. Proportional legal necessity was not unknown in India. Chakravartti, J., admitted in Kalipada Koer v. Purnabala Dassi¹ that at one time a doctrine grew up in India that the consideration for a sale ought to be subjected to an arithmetical analysis and if it was found that the whole of it was not justified by legal necessity, then the transaction ought to be upheld or set aside conditionally, according as the part justified by legal necessity was the greater or the lesser part. The condition would be to make a refund of the portion of consideration money not applied, or applied to legal necessity, as the case might be. The learned judge further stated that the growth of this doctrine was checked by the Judicial Committee by their decisions in Sri Kishun Das v. Nathu Ram², Niamat Rai v. Din Dayal³ and Gouri Sankar v. Jiwan Singh⁴. These were cases of sales by the manager of a joint family. Therefore, in contradistinction to the validity of a manager's alienation, the validity of a guardian's alienation should

1 AIR 1948 Cal 269, 271.

2 AIR 1927 PC 37.

3 AIR 1927 PC 121.

4 AIR 1927 PC 246.

be generally in proportion to the legal necessity for the consideration.

Where the guardian of a minor sells the minor's property, it is the duty of the purchaser to see that the consideration is intended to be properly invested by the guardian. Benson and Sundara Aiyar, JJ., held in Kaliappa Goundan v. Devasigamani Pillai¹ that if a guardian sold a minor's property and purchased land of less value, the sale not being prima facie beneficial to the minor, was not binding upon him. The learned judges stated that in such circumstances it was incumbent on the purchaser to make an enquiry as to the real value of the land, and he should have advanced money in good faith that it would be used for the purpose which would make the sale beneficial to the minor. If the purchaser could not prove this, the sale could be set aside. It was not enough that the purchaser believed in the guardian's statement or recital in the sale deed, since mere recitals are not sufficient to establish the facts recited². Although the purchaser is not bound to look to the application of the purchase money, or to enquire whether there are goods and chattels sufficient to discharge the minor's debts, yet if he fails to prove the necessity, or if he does not satisfy himself as to the existence of necessity, the sale would be set aside³.

1 (1913) MWN 795.

2 Krishna Rao v. Aiyasami Padayachi (1914) 27 MLJ 138.

3 Gomain Sircar v. Prannath Goopto (1864) 1 WR 14 (CR).

A sale of a minor's property becomes binding on the minor if the major portion of the purchase money has been applied for a binding purpose, and the balance is spent for the necessity or benefit of the minor. Thus where it is found that out of the consideration money of Rs. 600/- an amount of Rs. 400/- was paid off to discharge an ancestral debt incurred by the minor's father and the remaining Rs. 200/- was expended in purchasing a piece of land for the minor, the sale of the minor's property by his guardian was upheld¹.

In Birad Raj v. Dhingarmal² Wanchoo, C.J., and Dave, J., held that a natural guardian was not authorised to sell away the minor's property to any extent without having regard to the measure of the necessity. Where the only immediate necessity was for a small amount the sale of a very small portion of the property would be sufficient for that purpose. In other words the amount of property to be disposed of by a natural guardian must be proportionate to the needs of the minor. Indeed, if the courts take into consideration only the bona fides of alienees it protects the interests of the alienees and not of the minors. Minors may not be successful in impeaching the transaction of a bona fide purchaser for value without notice of any invalidity; but if the courts looked into the proportion between the amount of necessity and the amount of property disposed of much of the interests of minors would have been saved.

1 Thanhavelu v. Nachu Narayana AIR 1933 Mad 352.

2 AIR 1955 NUC (Raj) 4608 relying on Ratnam Pillai v. Ganapathi AIR 1953 Mad 238.

A natural guardian cannot convert the separate property of a minor into the joint property of himself and the minor¹, nor can he sell it at an enhanced value merely for the purpose of increasing the income of the minor unless he applies the purchase price securely and for the benefit of the minor². Again, unless the purchase price is applied for legal necessity, or unless it is properly invested in a recognised, beneficial security, a natural guardian cannot sell a minor's lands on the ground that they are situated at a long distance from the village where the minor resides, and that it is inconvenient to look after³. Thus where a father effects a sale of his minor son's lands which do not yield any income or profit and invests the sale proceeds in income yielding lands, the sale is held as good and valid, and the minor is bound by such sale not merely because it increases the minor's income, but also because it prevents loss to the estate⁴.

2.3.3. Mortgage by natural guardians

With regard to the alienation of a minor's property by his guardian there is no difference of principles between a sale and a mortgage⁵. The grounds on which a guardian can validly sell his ward's property are the grounds on

1 Ragho v. Zaga AIR 1929 Bom 251.

2 Hemraj v. Nathu AIR 1935 Bom 295 (FB).

3 Ramnath v. Deoraj AIR 1957 Pat 495, 496.

4 Rabi Narayan v. Kanak Prova Debi AIR 1965 Cal 444, 445.

5 Raman v. Tirugnansambandam AIR 1927 Mad 233, 237-38.

which he can mortgage the minor's property. A natural guardian of a minor can grant a mortgage of the minor's property¹, but the lender must ascertain whether the guardian is acting for the benefit of the minor or for himself. If it is for his own purposes the mortgage cannot be treated as one for the benefit of the minor². The mortgagee must ascertain whether the guardian was acting for the benefit of the minor; he must enquire whether there was necessity to borrow the money on behalf of the minor, otherwise he could not claim to have a charge on the minor's property³. If he does so enquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and under such circumstances he is not bound to see to the application of the purchase money⁴. Where a guardian borrows money on behalf of a minor, the proper test in a suit by the lender is whether the minor could reasonably and prudently have incurred the debt himself. It is not sufficient for the lender to show only that the loan was announced by the guardian to be for a necessary purpose⁵. When necessities for the minor have

1 Manishankar Pranjivan v. Bai Muli (1888) 12 Bom 686.

2 Gunduchi Sahu v. Balaram Balabantra AIR 1940 Pat 661, 662.

3 Maha Beer v. Dumreeram Opadhya (1864) WR 166 (CR); Dalibai v. Gopibai (1902) 26 Bom 433; Kader Hoosein v. Mudeliar (1913) 18 IC 505; Shami Nath Sathi v. Lalji Chaube (1913) 18 IC 251.

4 Hunoomanpersaud's case (1856) 6 MIA 393, 424.

5 Manohar Lal v. Ratan Singh AIR 1930 Lah 588, relying on Dulichand v. Mt. Sonai AIR 1926 Nag 75, 77.

been purchased with loans advanced by a creditor on a bond he should take care that the bond is so drawn up as to make the minor's estate and not him personally liable for the debt¹.

Where a guardian mortgages a minor's property to pay the minor's deceased father's debts, once the proper application of a substantial portion of the consideration has been proved, the court might, in the absence of circumstances creating suspicion, presume that the small balance is also likely to have been required and applied for proper purposes². But in such cases the courts must be very careful about the balance money and look to its proper investment by the guardian; and if any underhand transaction is proved between the guardian and the mortgagee or if the latter has exercised any undue influence over the former, the whole transaction would be set aside.

2.3.4. Lease by natural guardians

Rules which are applicable to a guardian's alienation in general are also applicable to leases by him. A lease does not cease to be an alienation because it is not permanent, or if it is permanent, it has a string elsewhere. Therefore, a guardian cannot lease out a land belonging to a minor unless

1 Armugam Chetti v. Duraisinga Tevar (1914) 37 Mad 38, 46 relying on Bhawal Sahu v. Baijnath Pertab Narain (1908) 35 Cal 320.

2 Ambalavana Pillai v. Gowri Ammal AIR 1936 Mad 871, 873.

there is legal necessity for it or it is for the benefit of the minor's estate¹. The duration of a lease may be a relevant factor in determining its necessity or the benefit from it, but it cannot alter the principles which determine the validity of an alienation. Once a lease is validly granted by the guardian, the lessee cannot be ejected except on a suit for arrears of rent².

Being in a fiduciary relationship with the minor the guardian should not make a profit out of the minor's property. If ever he does so through the intermediary of others, he may be liable on a suit. Where a plot of land belonging to a minor was given on lease by the guardian to his own relation and it was found that the lessee was merely a benamidar for the guardian Shadi Lal, C.J., held that a claim against the guardian for the lease money could be sustained only on the basis of a contract or a quasi-contract and could not be enforced by a summary remedy because the judge could not make a summary order calling upon the guardian to deposit the lease money in the court; and the minor was therefore referred to a regular suit³.

2.4. Contracts by natural guardians

2.4.1. Contracts for loan

A guardian who has to manage a minor's estate must have, in the case of necessity or benefit of the estate, the

1 Haribhau v. Hakim AIR 1951 Nag 249, 250; Bageshwari Prasad v. Deopati Kuer AIR 1961 Pat 416, 418; Bhusan Chandra v. Hiranmay AIR 1957 Tri 1.

2 Bhaqwan Das v. Ghulam Mohammed AIR 1935 Lah 863.

3 Arur Singh v. Gur Bakhsh Singh AIR 1932 Lah 272.

power to deal with the estate in the manner best suited to the occasion in the interest of the minor; and such a power may extend to charging or alienating the properties of the minor in cases where no other course is open. The minor would be bound by such charging or alienation. But it does not necessarily follow that the guardian can make contracts of loan on behalf of the minor so as to involve the minor and his estate in obligations or liabilities. In English law an executor or trustee cannot by borrowing money from a person make him creditor of the estate in his hands even though the money was applied for the purpose of the estate. In Farhall v. Farhall¹ Mellish, L.J., took it to be a settled law that upon a contract of borrowing made by an executor after the death of the testator the executor was only liable personally and could not be sued as executor so as to get execution against the assets of the testator. The principle enunciated in this case has been applied to the case of an executor or trustee in India in Shailendra-nath Palit v. Hade Kaza Mane². This general rule is subject to the exception that in a proper case the executor or trustee may be entitled to be indemnified out of the specific assets in his charge³. Therefore in cases in which a minor's

1 (1871) 7 CA 123.

2 AIR 1932 Cal 356.

3 Re Johnson, Shearman v. Robinson (1880) 15 Ch D 548; Dowse v. Gorton (1891) AC 190 (HL); Re Frith, Newton v. Rolfe (1902) 1 Ch 342.

needs have to be met by incurring debts the guardian can also show that the estate ought to bear the burden which he has taken upon himself; and the creditor may invoke, under the equitable principle of subrogation, the guardian's right to reimbursement out of the minor's estate.

2.4.1.1. Privy Council decisions on guardians' contracts

Although the Privy Council decision in Hunoomanpersaud's case allowed the manager or guardian of a minor's estate to exercise a limited and qualified power 'in a case of need, or for the benefit of the estate', it was not seen until the decision in Waghela Rajsanji v. Shekh Masludin¹ how far he could use this power to bind the minor or his estate by a contract. Their Lordships of the Privy Council held in this case that it was beyond the power of a guardian to impose a personal liability on the minor. In that case a widow as guardian of her minor son transferred certain rent free villages, part of a talukdari estate in liquidation of certain debts due from the minor's father, and in the deed of transfer contracted on behalf of the minor to indemnify the transferee against any government claim for revenue. Subsequently, when the government enforced the payment of revenue upon the said villages the transferee filed a suit for the realisation of the amount paid as rent from the minor personally and also out of the rents and profits of

1 (1887) 14 IA 89 (PC).

the minor's other estates. In delivering the judgment of the Judicial Committee Lord Hobhouse observed¹:

"Now it was most candidly stated ... that there is not in Indian law any rule which gives a guardian and manager greater power to bind the infant ward by a personal covenant than exists in English law. In point of fact, the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English law if found applicable to Indian Society and circumstances. Their Lordships are not aware of any law in which the guardian has such a power, nor do they see why it should be so in India. They conceive that it would be a very improper thing to allow the guardian to make covenants in the name of his ward, so as to impose a personal liability upon the ward, and they hold that in this case the guardian exceeded her powers so far as she purported to bind her ward, ...".

There is nothing contained in the above paragraph which prohibits a guardian from entering into contracts which are for the minor's necessity or for the benefit of his estate as decided in Hunoomanpersaud's case. It lays down only that a guardian cannot enter into a contract imposing an onerous obligation upon the person and property of a minor². In the course of his argument before the Privy Council Mr. Mayne, Counsel for the respondent, put in a circuitous way that if the minor's estate drew any benefit under the contract, a charge could be made on the property. Their Lordships appreciated the argument but they left the question open when they remarked³:

"The argument is one which is worthy of great consideration, but their Lordships do not wish

1 (1887) 14 IA 89, 96 (PC).

2 Mir Sarwarjan v. Fakharuddin Mahomed Chowdhury (1907) 34 Cal 163, 170 (FB) per Woodroffe, J.; Ramajogaya v. Jagannadham AIR 1919 Mad 641, 644 (FB) per Seshagiri Aiyar, J.

3 (1877) 14 IA 89, 97 (PC).

to pronounce any opinion on it or to subject it to any minute examination, because assuming it in favour of the Respondent to be a sound argument, they are clearly of opinion that so far as regards the talukdari estate ... an answer to it is to be found in the terms of the Ahmedabad Talukdari Act, Act 6 of 1862".

Five years later this question was raised before the Privy Council in Indur Chunder Singh v. Radha Kishore Ghose¹ where upon the death of an ijaradar his mother and widow remained in possession of the leased land as managers under his will which also authorised the widow to adopt a son. Subsequently a son was adopted to him and the adopted son succeeded to his estate. The lease having expired, a renewal for five years was taken by the managers, but was surrendered after the expiry of a period of two years when the son was still a minor. When the son attained full age the lessor brought a suit against him for the recovery of the three years rent of the renewed ijara. In these circumstances, their Lordships of the Judicial Committee held that the contract of the adoptive mother and guardian was not personally binding on the minor, and that if a guardian entered into a contract in her own name and did not purport so to act on the minor's behalf, no decree could be passed against the estate of the minor on such a contract. After distinguishing Hunoomanpersaud's case their Lordships observed²:

"In the present case the mother and widow ... were not dealing with, and did not purport to deal with or affect, his estate, but were incurring new obligations which it is now sought to transfer from them to the estate. It may be that, as between them and the infant, they might be able, in some

1 (1892) 19 IA 90 (PC).

2 Ibid, 94.

circumstances, 'to shew that the estate ought to bear the burden they had taken upon themselves, but that is not the question raised in this case, in which the plaintiffs seek to establish a direct relation between themselves and the estate of the infant, and a liability on the part of the infant now that he is of age, and of his estate, to fulfil the obligations entered into by the lessees in their own name".

In Watson & Co. v. Sham Lal Mitter¹ a mother purchased for her minor son certain rights in land and also agreed to the enhancement of rent payable by the tenants. She contracted for enhancement of rent as guardian of her son. The Privy Council held that her agreement for the enhancement of rent acting in lawful capacity was binding on the minor's estate. Thus a guardian has no power to bind a minor personally by a contract which does not purport to charge his estate.

2.4.1.2. Different High Courts on guardians' contracts

(a) Madras High Court

Only seven years after Waghela Rajsanji's case Muthusami Ayyar and Best, JJ., held in Sundararaja v. Pattanathusami² that a guardian could enter into a contract on the minor's behalf, and it would be binding on the minor if there was necessity for the subject of the contract. White, C.J., and Benson, J., held in Subramania Ayyar v. Arumuga Chetty³ that a minor's estate was bound by a promissory

1 (1887) 14 IA 178 (PC).

2 (1894) 17 Mad 306.

3 (1902) 26 Mad 330.

note executed by his mother-guardian in respect of a debt for which the minor's share in the ancestral estate was liable at the time of execution of the note. In Duraisami Reddi v. Muthial Reddi¹ a bond was executed by the guardian of a minor as such, and it contained a personal covenant by the guardian to pay a debt but it did not charge the minor's estate. It was held that the minor would be bound by it if it was executed for a pre-existing debt binding on the minor. Indeed, the Privy Council decision in Waghela Rajsanji's case forced the Anglo-Indian judges either to look to the English equitable principles or the personal law of the minor to protect the interests of creditors or lenders under a simple contract debt. Thus it would be found that although a guardian cannot bind a minor by a personal covenant, he can bind his estate by an indirect process through the principle of subrogation. Wallis and Munro, JJ., sitting together in Sanka Krishnamurthi v. Bank of Burma² imported the English principle of subrogation by allowing creditors to proceed directly against the minor's property when the guardian properly incurred the liabilities. Following the decision in Joykisto Cower v. Nittyanund Nundy³ the learned judges found that unlike a guardian in English law⁴ a natural guardian of a Hindu minor could properly carry on a family business belonging

1 (1908) 31 Mad 458.

2 (1912) 35 Mad 692.

3 (1878) 3 Cal 738.

4 Land v. Land (1874) 43 Ch 311 per Jessel, M.R.

to the minor, and to this they added the English rule that the guardian or legal representative, and not the minor or beneficiary on whose behalf the business was carried on, was the person personally liable on contracts entered into in the course of the business¹. Creditors of a minor's business had therefore no right of direct recourse against the minor or his estate; but, as the guardian was entitled to indemnity out of the assets of the minor for liabilities properly incurred, creditors were entitled to proceed directly against such assets. If, however, the guardian had no right to indemnity against the assets in the business, as where he had acted improperly, his creditors could have none². In its early cases the Madras High Court did not apply the principles of Negotiable Instruments Act (Act 26) of 1881 in considering the binding effect of bonds executed by guardians on behalf of minors; the principles of Hindu law were applied, and the minors' estates were usually held liable if the debt evidenced by the promissory note was borrowed for necessity or for the benefit of the minor. The claim was considered as not made on the note but on the debt evidenced by it.

In Padma Krishna Chettiar v. Nagamani Ammal³, where the guardian of a minor executed a negotiable instrument for purposes binding on the minor, Seshagiri Ayyar, J.,

1 Henry Labouchere v. Emily Tupper (1857) 11 Moo PC 198; 14 ER 670 per Knight Bruce, L.J.

2 Ex parte Garland (1804) 10 Ves 110; 32 ER 786; Dowse v. Gorton (1891) AC 190 (HL).

3 (1916) 39 Mad 915.

sitting with Napier, J., applied the principles of Hindu law and not sections 28 and 30 of the Negotiable Instruments Act which were brought to their notice. It was laid down in this case that a minor's estate could be made liable for a debt contracted by the guardian. In Venkitasami Naicker v. Muthusami Pillai¹ the same judges affirmed their earlier decision in Padma Krishna's case, but the learned judges admitted this time the desirability of applying the principles of the Negotiable Instruments Act to cases of bonds and notes when they observed that a great deal could be said in favour of the proposition that the Hindu law liability should not be extended to cases under the Negotiable Instruments Act². In this case the guardian of a minor executed a bond in favour of a mortgagee to pay certain expenses incurred by him which were considered reasonable. The learned judges reviewed the early decisions of their own High Court and considering the decision in Waghela Rajsanji's observed that it went no further than this that no decree could be passed against a minor personally, but a decree could be made against his estate.

In Ramajogaya v. Jagannadham³ a Full Bench of the Madras High Court considered the question how far a guardian's contract could bind the minor's estate. In this case the mother as guardian of her minor son borrowed money for the

1 (1918) 45 IC 949.

2 Ibid, 953.

3 AIR 1919 Mad 641 (FB).

marriage of the minor's sister and executed a mortgage deed in favour of the plaintiff. The trial court held that the minor was bound to liquidate the debt, and that the plaintiff was entitled to a decree for the mortgage amount. On appeal it was argued before a Division Bench that no personal decree could be given against a minor on an obligation created by his guardian. The Bench referred the case to a Full Bench, and Napier, J., who wrote the order of reference, put the question whether any decree, and if so, what decree could be passed against a minor or his estate on a covenant entered into on his behalf by a guardian for his benefit, under which covenant no charge was made on the estate. The Full Bench was presided over by Wallis, C.J., Ayling and Seshagiri Aiyar, JJ. It considered inter alia the decision in Waghela Rajsanji's case. The learned Chief Justice observed that according to that decision no guardian could impose a personal liability upon a minor, and that according to Ranmalsingji v. Vadilal Vakhatchand¹ the Privy Council decision in Waghela Rajsanji's case did not affect the liability of the minor's estate under section 68 of the Contract Act² to persons who had supplied him during his minority with necessaries suited to his condition in life. It was further observed on the authority of Sanka Krishnamurthi's case that where a guardian himself borrowed money for the necessities of the minor in such circumstances

1 (1894) 20 Bom 61.

2 See supra, 107-108.

as to have a right to reimbursement from the minor's estate, his creditor could in a proper case be subrogated to his rights, and that a minor's estate could be made liable under one of the two heads independently of any contract by the guardian on his behalf, viz., liability for necessities under section 68, and creditor's subrogation. In answer to the reference the learned Chief Justice said that no decree could be passed against a minor or his estate merely on a covenant entered into on his behalf by a guardian for his benefit. The other two learned judges disagreed with the Chief Justice. Seshagiri Aiyar, J., with whom Ayling, J., agreed, held that on a contract entered into on behalf of a minor by his guardian under which the guardian borrowed money but no charge was created on the minor's estate, no decree should be passed against the minor on his attaining majority except for an obligation incurred by the guardian under the personal law to which he was subject.

The decision in Waghela Rajsanji's case is, therefore, subjected to two exceptions, viz., (i) where the contract is for necessities supplied to a minor, and (ii) where the liability is one to which the minor is subject under his personal law, a supplier or creditor has a direct recourse to the minor's estate. In these two cases the guardian may directly bind the minor's estate. As seen earlier where necessities are supplied to a minor his estate can be made liable for them under section 68 of the Contract Act of 1872.

Under the English law also when a sum of money is advanced to a minor to enable him to provide himself with necessaries, the lender stands in equity in the place of the supplier of necessaries and accordingly can maintain an action for the money¹. But it must be mentioned here that completely different from Hindu and Muslim law, in English law the real estate of a minor cannot be bound by a contract, nor settled or alienated by his guardian or parent apart from statutory authority.

The decision in Ramajogaya's case was subsequently followed in the Madras High Court in a number of cases², and was affirmed by another Full Bench of the same High Court in Satyanarayana v. Mallayya³ where the mother executed a promissory note in renewal of an earlier promissory note executed by the father of her minor sons. Ramesam, J., in delivering the judgment of the Full Bench observed that any liability to which a minor would be subject under Hindu law was not the less a liability because it was incurred by his guardian on his behalf. Once the Hindu law liability of the minor is admitted, the judges could bring in the principles of Hunoomanpersaud's case to decide the liability of the minor's estate. But the principles must not

1 Walter v. Everard (1891) 2 QB 369 per Lord Esher, M.R.

2 Zamindar of Polavaram v. Maharaja of Pittapuram (1931) 54 Mad 163; Meenakshi Sundaram v. Ranga Ayyangar AIR 1932 Mad 696; Natesa Nattar v. Manicka Nattar AIR 1938 Mad 398; Seetharamayya v. Sathiah AIR 1938 Mad 716; Sudarsana Rao v. Dalayya AIR 1943 Mad 487; Pundarikakshayya v. Sreeramulu AIR 1946 Mad 1 (FB).

3 AIR 1935 Mad 447 (FB).

be so extended as to include cases which are not actually in accordance with Hindu law. Krishnaswami Ayyangar, J., over-extended the principles of Hunoomanpersaud's case and came to find that even simple debts could be incurred by guardians and they would be binding on minors' estates. Sitting with Pandrang Row, J., in Ramanathan Chettiar v. Palaniappa Chettiar¹ the learned judge observed that a guardian could under Hindu law bind the minor's estate by a personal contract, such as one for incurring a simple debt, if it was entered into during the course of and for the purpose of carrying on the business of the ward. In incurring such a debt the learned judge did not consider that the guardian's power to bind the minor's estate was restricted to a pre-existing liability. If the guardian was found to have acted in circumstances regarded as sufficient to bind the minor according to the general principles of Hindu law, the estate of the minor would be bound. A pre-existing liability was only one such circumstance; it was not the only factor that enabled a guardian to enter into a contract binding on the minor. The facts and circumstances of necessity or benefit which ordinarily justified an alienation under Hindu law would support a contract for simple debt as well. Again in Annamalai Chetty v. Muthusawami Maniagarar² Krishnaswami Ayyangar, J., sitting with Leach, C.J., held that the true test for

1 AIR 1939 Mad 531.

2 AIR 1939 Mad 538.

determining the binding character of a Hindu minor's estate for a simple contract debt incurred by his guardian was that laid down by the Privy Council in Hunoomanpersaud's case, that under the Hindu law the guardian had power to contract loans so as to bind the minor's estate for necessary purposes, and that there was no difference in the test to be applied whether the money was obtained by pledge or sale of the property or by way of simple loan. In his attempt to empower a natural guardian under Hindu law to incur a simple contract debt and to bind the minor's estate for such debt the learned judge removed the requirement of a pre-existing liability which allowed a minor's estate to be bound by a guardian's contract for simple debt. The learned judge considered it a great anomaly if a guardian was denied the power to contract a simple debt while he was competent in similar circumstances to charge or even sell a portion of the minor's immovable property. He did not like to see any difference between a simple loan and a loan contracted on a security, and did not consider the risk of allowing a guardian to obtain money by way of a simple loan and the advantage of allowing him to obtain it by charging or selling the minor's property for an antecedent debt. He did not notice that when a specific immovable property belonging to a minor was transferred by the guardian, the alienee could assert his right to that particular property on the strength of the transfer provided he could establish legal necessity or benefit of the estate; on the contrary,

a lender who advanced money to the guardian without any charge could not claim to recover his money from the minor's property unless it was covered by section 68 of the Contract Act. The learned judge extended the meaning of the principles of Hunoomanpersaud's case to cases of simple borrowing without any charge on the minor's property and stated that what the Judicial Committee said with regard to a guardian's power in that case had been widened to integrate even the power of simple loan. He disregarded the fact that the whole object of conferring power upon the guardian to deal with the minor's property was to protect the interest of the minor, and for the protection of that interest the possibility of cheating and indiscriminate use of the minor's property should be stopped. So long as a loan was incurred to discharge an antecedent debt, the twin principles of Hunoomanpersaud's case could be applied. But it is inscrutable how the learned judge justified their application in the case of a simple loan as such. It would be dangerous to lay down in the case of simple loans that the minor's estate is liable even though the money raised by loan was not applied to actual necessity. It is yet to be seen how far the learned judge fulfilled his own duty of safeguarding the minor's estate against indiscriminate borrowing by the guardian. It is strange that the learned judge in giving such a power to a guardian did not mention the decision in Brij Narain v. Manqla Prasad¹ and take notice

¹ AIR 1924 PC 50.

of the second and third propositions of its five classic propositions. The second proposition empowers only the father-manager to incur a debt, and so long as it is not for an immoral purpose he can lay open the estate to be taken in execution proceedings upon a decree for payment of that debt; and the third proposition empowers a manager to bind the estate by mortgage only when that mortgage is to discharge an antecedent debt. Certainly a guardian's power cannot be greater than that of a manager. How can a power, which the Privy Council did not dare to give in Brij Narain's case even to a coparcener manager of a joint Hindu family, be given to a guardian who may be a stranger? So it is difficult to agree with the learned judge when he disagreed with the following passage from Trevelyan's Law Relating to Minors¹:

"Although a guardian may under certain circumstances sell or charge his ward's property, he cannot bind his ward personally by a simple contract debt, by bill of exchange, by covenant, or by any promise to pay money or damages, unless such promise be made merely to pay or keep alive a debt for which the ward's property was liable".

Leach, C.J., sitting with Madhavan Nair, J., in Seetharamayya v. Sathiah² observed that in proper cases it was within the competence of a Hindu guardian to bind a minor by executing a promissory note. By 'proper cases' presumably the learned Chief Justice meant cases within the purview of the decision in Hunoomanpersaud's case. The liability of

1 (6th ed.), 169.

2 AIR 1938 Mad 716.

the minor would, however, be limited to the assets of the estate in his hands. The facts of this case were almost identical with Satyanarayana's case. The learned Chief Justice spelt out the law clearly in Rajarathna Chettiar v. Mahboob Sahib¹. This time sitting with Patanjali Sastri, J., very tersely he stated that although a minor could not be bound by a personal covenant in a contract entered into by his guardian, his personal law would affect the position. Under his personal law the natural guardian of a Hindu minor had power without the court's sanction to mortgage or sell any part of the minor's estate. Following the principles of Hunoomanpersaud's case the learned Chief Justice said that in cases of necessity the guardian of a Hindu minor could borrow money upon a promissory note, and the minor's estate would be liable for repayment. Referring to Annamalai Chetty's case he observed that the minor was not bound on the note, but on the debt evidenced by the note, and that the liability was created by his personal law.

The decision in Ramajogaya's case was uniformly followed in binding the minor's estate by his guardian's properly executed contract. In Sudarsana Rao v. Dalayya² Wadsworth and Patanjali Sastri, JJ., held that a contract made by the guardian of a Hindu minor to pay maintenance to the minor's paternal grandmother was binding on the minor since under Hindu law the minor was liable to maintain her; and therefore a decree could be passed against the minor's estate

1 AIR 1940 Mad 106.

2 AIR 1943 Mad 487.

in respect of such contract. In the course of his argument the counsel for the appellant suggested that the decision of the Full Bench in Ramajogaya's case was overruled by the Privy Council decision in Zamindar of Polavaram v. Maharaja of Pittapur¹ Patanjali Sastri, J., who delivered the judgment of the Bench, rejected the suggestion by referring to the following passage from Mayne's Hindu law² and its subsequent following in Annamalai Chetty's and Ramanatha Chettiar's case:

"In Zamindar of Polavaram v. Maharajah of Pittapur the Privy Council, reversing the decision of the Madras High Court, held that where a minor is not personally responsible for the payment of the debt, no decree against the 'general assets' could be given. It does not however appear that the Privy Council intended to overrule the decision in Ramajogaya's case which was cited before it. The observation probably proceeded on the special facts of the case".

(b) Bombay High Court

The Bombay High Court considered the question whether a guardian could bind the minor by his contract entered into for the benefit of the latter in Ranmalsingji v. Vadilal Vakhatchand³, where the mother of a minor son borrowed money for the purpose of a pilgrimage to sacred places, and to defray the marriage expenses of the minor. The lender got a decree against the minor's mother and his property in the trial court. On attaining majority the minor

1 (1936) 63 IA 304 (PC).

2 (10th ed.), 311.

3 (1894) 20 Bom 61.

applied for setting aside the decree. Fulton, J., who delivered the judgment of the case held that the guardian of a minor according to Hindu law could impose a charge on the minor's estate for obligatory purposes, but he could not bind him personally by contracts entered into by him which did not purport to charge the minor's estate. Where, however, debts were incurred for necessities, the minor would be bound to pay for them under the general principles contained in section 68 of the Contract Act, and this liability would not be affected because the loans were advanced at the instance of the guardian. In that case the expenses for the minor's marriage being found illegal and the expenses for pilgrimage unnecessary, debts incurred for them were held not binding on the minor's estate. Thus a guardian can bind the minor's estate either under the personal law of the minor or under statutory law, but both are covered by the decision in Hunoomanpersaud's case. In Keshav v. Balaji¹ Rangnekar, J., observed that a minor could not be bound personally by a simple contract debt, nor could his estate be bound except by a document purporting to bind it. The learned judge further said that the principles to be applied in the case of a minor in regard to a personal contract or covenant must be the same whether the minor happened to be a ward of the court or was under the protection of a testamentary or natural guardian. In this case

¹ AIR 1932 Bom 460. Similar view was also taken in Shankar v. Nathu AIR 1932 Bom 480.

the guardian borrowed money for constructing buildings and executed a promissory note in favour of the lender.

(c) Calcutta High Court

So far as the Calcutta High Court is concerned on this question a Full Bench decided in Joykisto Cower v. Nittyannund Nundy¹ that a minor would be liable for the debt contracted by his guardian for carrying on the minor's ancestral business; the liability would, however, be limited to the extent of the minor's share in the business. In Surendra Nath Sarkar v. Atul Chandra Roy² Maclean, C.J., sitting with Holmwood, J., held that a guardian could not bind the minor by a personal covenant. In Bhawal Sahu v. Baijnath Pertab Narain³ Brett and Holmwood, JJ., expressed the opinion that the rule that a natural guardian could not bind a minor by a simple contract debt or by any promise to pay money or damages, was subject to the modifications that the promise would not bind the minor unless it was merely to keep alive a debt for which the minor's property was liable, and that where the promise was to pay money which had been expended for necessaries the estate of the minor would be liable not on the promise but on the fact that money had been supplied. Ghose and Page, JJ., held in Rajaram Singh v. Pancha Deoqi⁴ that although a minor could not be made personally liable

1 (1878) 3 Cal 738 (FB).

2 (1907) 34 Cal 892.

3 (1908) 35 Cal 320.

4 AIR 1927 Cal 862.

for any debt incurred by his guardian on his own personal liability; if the debt was for the minor's necessity and was properly incurred by the guardian, the minor's estate would be bound by such debt by the application of the equitable principle of subrogation. Thus if a minor's guardian borrowed money for the purpose of carrying on a business of the minor which was continuing from before the date of the debt incurred, then, as the guardian was entitled to indemnity for liabilities properly incurred out of the assets of the minor in the business, creditors were entitled to proceed directly against such assets.

(d) Lahore, Patna and Nagpur High Courts

The Lahore Court did not mention the personal law to be the determinant of a minor's liability; they stuck at the 'prudent man' test¹. More recently, they began to follow other High Court decisions in this respect. In Kanhiya Lal v. Deep Chand² a minor's share in his ancestral trade was held liable when his natural guardian incurred debts for the purpose of carrying on that business. The Patna High Court laid down that a creditor could not obtain a decree against the minor's estate if he sued on a guardian's hand-note as such³. A Division Bench of that court held in Suchit Chaudhari v. Harnandan Singh⁴ that the guardian of

1 Manohar Lal v. Ratan Singh AIR 1930 Lah 588.

2 AIR 1947 Lah 199.

3 Kashi Prasad Singh v. Akleshwari Prasad (1920) 58 IC 22.

4 (1933) 12 Pat 112, following Padma Krishna's case (1916) 39 Mad 915.

a Hindu minor had power to contract loans on behalf of the minor for the latter's necessities and benefit and, although the guardian could not impose any personal liability on the minor, the estate of the minor was liable for such debt. If, however, a guardian contracts a debt on behalf of the minor with the sanction of the court, it would be binding on the minor's estate¹. The Nagpur Court followed the Privy Council decision in Waghela Rajsanji's case and did not allow a guardian's contract which did not purport to bind the minor's estate to bind the minor personally² and also did not allow a decree to be passed against the minor or his estate on a simple bond³. In Lalchand v. Narhar⁴ where the father of a minor owed money on bonds and on his death his widow acting for herself and as guardian of her minor son renewed and consolidated the earlier bonds by executing a new one, Prideux, A.J.C., held that a decree could be passed against the minor's estate, since the estate was under an obligation incurred by the father of the minor which the minor was bound to discharge according to his personal law. However, the law on this point has been more clearly and forcefully laid down by Pollock, A.J.C., in Shriniwasrao v Baba Ram⁵. The learned Judicial Commissioner said that the minor's estate was not liable on a contract executed by his guardian, which did not purport to bind his

1 Rai Shyam Bahadur v. Rameswar Prasad AIR 1942 Pat 441.

2 Tukaram Manaji v. Ramchandra Hari (1906) 2 Nag LR 25.

3 Jhitibai v. Tejmal (1917) 13 Nag LR 109.

4 AIR 1926 Nag 31.

5 AIR 1933 Nag 285.

estate, but that money expended on necessities could be recovered from his estate under the provisions of section 68 of the Contract Act. It was further stated that it was entirely immaterial whether the bond was executed by the minor or his guardian or whether no bond was executed at all, for the liability of the minor's estate arose not ex contractu but because the money borrowed was spent on necessities. In Sadasheo Balaji v. Shankar Govind¹ Bose and Puranik, JJ., brought in the Hindu law principles to make the law in this respect a complete whole in this court. The learned judges observed that the rule that a minor was not personally liable on a contract entered into on his behalf by his guardian was subject to two exceptions, viz., (i) where the contract was for necessities supplied to the minor or where money was advanced for such supplies; and (ii) where the liability was such that the minor was subject to it under his personal law. In these two cases a decree could be passed against the estate of the minor.

(e) Allahabad High Court

The Allahabad High Court viewed the question differently from other High Courts. In Kandhia Lal v. Muna Bibi² Blair and Aikman, JJ., emphasised the lender's duty of proper and reasonable enquiries as to the existence of necessity, and held that if after making such enquiries and entertaining

¹ AIR 1938 Nag 68. This case was followed in Pandurang Dhake v. Pandurang Gorle AIR 1947 Nag 178.

² (1897) 20 All 135.

a bona fide belief in the existence of such necessity the lender advanced money to a guardian, then he could proceed against the minor's estate, even though the sum borrowed by the guardian was not actually used for the minor's necessities or benefit. Although the decision seems to be in accordance with the principles of Hunoomanpersaud's case, it overreaches the principles. As seen from the decisions of different High Courts creditors' right against the minor's estate is based on the rule of subrogation which would not allow the creditors to proceed against the minor's estate unless the guardian who borrowed money on the minor's behalf himself has a right of indemnity against the minor's assets. Where money is not invested for the minor's necessities or benefit, how will the court allow a charge to be created on the minor's estate? So also the suppliers of minor's necessities would not be entitled to be paid merely because they have supplied goods to the minor for which the minor may not have any necessity. It is the necessity for the goods that determines whether or not the minor is bound to pay for them and not the reasonable belief of the supplier that they were necessary¹. As long back as in 1894 Farran, J., warned in Ranmalsingji's case that the ruling in Hunoomanpersaud's case that a bona fide creditor should not suffer when he acted with due caution could not be extended to a case in which it was sought to make the minor or his estate liable for a debt.

¹ Barnes v. Tove (1884) 13 QBD 410; Johnstone v. Marks (1887) 19 QB 509.

Therefore it is obvious that unless a guardian's contract creates a charge on the minor's estate or unless the guardian discharges by it an obligation deemed binding on the minor under his personal law, it would not bind the minor. Whether the contract binds the minor under his personal law or under statutory law, or whether it falls within the principles laid down in Hunoomanpersaud's case, the said principles should not be extended to a risky extent like Krishnaswami Ayyanger, J., of the Madras High Court, or understood partially like the Division Bench of the Allahabad High Court. From the decisions of different High courts it appears as settled law that a guardian can bind the minor's estate by a simple contract of loan only (i) if the loan is taken by the guardian in the circumstances falling under necessities within the meaning of section 68 of the Contract Act; and (ii) if the loan is taken by the guardian for legal necessity or benefit of the minor's estate within the meaning of the principles of Hunoomanpersaud's case. In either case the doctrine of subrogation will be applicable and the creditor will be able to proceed against the minor's estate.

2.4.1.3. Indian Federal Court on guardians' contracts

The question of the binding effect of a guardian's contract for simple debt was finally considered by the Federal Court of India in Sriramulu v. Pundarikakshayya¹.

¹ AIR 1949 FC 218.

Although the Federal Court case was mainly concerned with regard to the contractual capacity of a de facto guardian, the learned judges made their observations following the decision in Hunoomanpersaud's case and stated the principles in general terms applicable to both de jure and de facto guardians. Posing the question whether there was liability for money borrowed for necessity and, if so, in what manner it could be so borrowed, Kania, C.J., stated that "loans taken for the necessity of a Hindu minor have been ordered by the courts to be repaid out of the minor's estate"¹. The learned Chief Justice stated further that although in case of necessity a guardian could borrow money under section 68 of the Contract Act and Hindu law as well, but that would be no justification for extending the application of the principle of necessity to transactions which did not strictly conform to that test, as that would open the gate to indiscriminate borrowings by the guardian. In reply to the question whether the guardian of a minor could bind the minor's estate by a simple contract of loan entered into on his behalf in case of necessity, Fazl Ali, J., observed that a guardian could not bind the minor by contracts or obligations and then compel him to transfer his estate or enable the creditor to establish a direct relation between himself and the estate, but in cases of necessity or benefit to the minor he might be able to show that the estate ought to bear the burden which he had taken upon himself; and in

¹ AIR 1949 FC 218, 221-222.

such cases the creditor could directly make the estate of minor liable under the principle of subrogation¹. Mukherjea, J., posed the question how far a guardian in Hindu law whether de jure or de facto could bind his ward personally by a simple contract debt, or by a covenant or promise to pay money without creating a charge on his properties, and to what extent, if any, such liability could be enforced against the estate of the minor. The learned judge said that when the guardian himself was party to the contract in his capacity as guardian, a suit could be brought against him and a decree obtained; but simply because he was sued in his capacity as guardian, the estate of the minor could not be proceeded against in the execution of the decree obtained against him. In such a case as the guardian was personally liable under the contract, he would be entitled to reimbursement from the minor's estate under the rule of Hindu law if the borrowing was for necessity or benefit of the minor; and the creditor could invoke the equitable doctrine of subrogation in his favour and claim to be placed in the guardian's position for the enforcement of the latter's right of reimbursement against the minor's estate. The learned judge thought it as the only way in which the Hindu law rights of the guardian in the matter of contractual debts for necessity or benefit of the minor could be given effect to in perfect consonance with the well established principles of the law of contract². Almost the same

1 AIR 1949 FC 218, 226.

2 Ibid, 237.

view was expressed by Mahajan, J. The learned judge stated that contracts of loan entered into by the guardian could not bind the minor's person, but they could bind the minor's estate by an indirect process, i.e., under the rule of subrogation. The guardian himself could become liable for those debts personally and entitled to reimbursement and indemnity from the minor if the debts were incurred for the needs of the minor; and when the guardian himself had the right of reimbursement and indemnity from the minor, the creditor on the rule of subrogation would be entitled to proceed against the property of the minor. The learned judge pointed out that the rule of subrogation in this regard had two exceptions in which a lender has direct recourse to the minor's estate, viz., (a) where the contract was for necessities supplied to the minor, and (b) where the liability was one to which the minor was subject under Hindu law¹.

From the remarks of the learned judges of the Federal Court it has now become the established law that a guardian cannot enter into contracts of loan making the minor or his estate liable direct to the creditor². But where a guardian personally makes himself liable under a contract or if it is true as Derrett has said³ that all acts by the guardian are done by him in his own name for the purposes of the minor, the creditor can indirectly proceed against the minor's estate under the rule of subrogation provided the guardian has acted properly. There cannot be a direct recourse by

1 AIR 1949 FC 218, 254.

2 Suryaprakasam v. Gangaraju AIR 1956 AP 33, 45 (FB).

3 Introduction, 78 para 97.

the creditor against the minor's estate except in the case of necessities supplied to the minor under section 68 of the Contract Act and of personal law liability.

2.4.2. Contract for sale

In 1856 it was decided in Hunoomanpersaud's case that a guardian could mortgage his minor ward's property in a case of need or for the benefit of the latter's estate and subsequently this decision was extended to apply to sale, but in 1948 the question came before the Privy Council in Subrahmanyam v. Subba Rao¹ how far a guardian could bind the minor's estate by a contract for the sale of such property. The Privy Council approached this question from a new perspective. This time they did not give much importance to the position and power of the guardian, rather they ignored him. By the application of the law of transfer of property their Lordships considered the guardian a shadow of the minor and held that in a contract for the sale of a minor's property the minor was 'transferor' within the meaning of section 53A of the Transfer of Property Act (Act 4) of 1882, and therefore a transferee from him who was in possession of property was protected under that section. The facts of the case show that the mother of a Hindu minor entered as guardian into a contract for the sale of the minor's property in order to discharge the debts incurred by the minor's deceased father. The purchasers

¹ AIR 1948 PC 95.

were let into possession of the lands contracted to be sold, but no sale deed was executed or registered. The minor being represented by his mother challenged the propriety of the contract of sale and claimed possession of the property. Section 53A of the Transfer of Property Act of 1882 provides:

"Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding the contract, though required to be registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof".

It will be seen from the section that the word 'transferor' refers back to the person who "contracts to transfer for consideration any immovable property by writing signed by him or on his behalf". Obviously, unless the minor enters into a valid contract to transfer his immovable property the provision of the section cannot be invoked.

Their Lordships, therefore, applied Hindu law to see whether it was within the powers of the mother to enter as guardian into a contract, and whether the contract so entered into was a valid one. Following the decision in Hunoomanpersaud's case their Lordships observed that they entertained no doubt that it was within the powers of the mother as guardian to enter into the contract of sale on behalf of the minor for the purpose of discharging his father's debts, and that, if the sale had been completed by the execution and registration of a deed of sale, the mother would have been bound under Hindu law. The contract of sale by the mother was therefore an act done on the minor's behalf. Again, referring to the law of contract their Lordships observed that although a minor's contract was void, contracts entered into on the minor's behalf by his guardian or manager were different. Their Lordships quoted the following passage from Pollock and Mulla's Indian Contract and Specific Relief Acts¹:

"It is, however, different with regard to contracts entered into on behalf of a minor by his guardian or by a manager of his estate. In such a case it has been held by the High Courts of India, in cases which arose subsequent to the governing decision of the Privy Council, that the contract can be specifically enforced by or against the minor, if the contract is one which it is within the competence of the guardian to enter into on his behalf so as to bind him by it, and, further, if it is for the benefit of the minor. But if either of these two conditions is wanting, the contract cannot be specifically enforced at all".

¹ (7th ed.), 70. The editor of the 9th edition has thoroughly recast the passage, but the contents of the passage are there.

Either of the two conditions, viz., competence of the guardian to bind the minor by his contract, and the benefit of the minor, has to be present, otherwise a guardian's contract cannot be specifically enforced. These conditions are the restatement of the law as contained in the decisions in Ramajogaya's and Hunoomanpersaud's case. But this decision is confined to cases of contract of sale or purchase, and it cannot be applied to cases of contracts for simple debts, since the rule of subrogation has no place in it. Again, the decision is confined to cases where the transferee is in possession under a contract that the property would be transferred to him ¹, in other words, in the case of executed contract and not in the case of executory contract ², and it can be used only as a shield ³ and never as a sword ⁴.

Since the decision in Subrahmanyam's case it has been held by most of the Indian High Courts ⁵ that a minor is bound by the contract entered into by his guardian for the sale of his property if the contract is according to this Privy Council decision, and in the case of personal contract the decision in Waghela Rajsanji's case continues to be followed ⁶.

1 Thota Chima v. Malapalli Raju AIR 1950 FC 1.

2 Sitarama Rao v. Venkatarama Reddiar (1956) 1 MLJ 5, 16 (FB).

3 Dammrlal v. Mahomedbhai AIR 1955 Nag 306; Sardarilal v. Shakuntala Devi AIR 1961 Punj 378; Motilal v. Jaswant Singh AIR 1964 Raj 11.

4 Achayya v. Venkata Subba Rao AIR 1957 AP 854, 856; Akram Mea v. Secunderabad Municipal Corporation AIR 1957 AP 859.

5 In Sitarama Rao v. Venkatarama Reddiar (1956) 1 MLJ 5 (FB) the Madras High Court distinguished this Privy Council decision and did not apply it to the sale of a minor's separate property.

6 I & G Investment Trust v. Raja of Kalikote AIR 1952 Cal 508, 520.

2.4.3. Contract for purchase

It will be seen in the next chapter that on a wrong understanding of the Privy Council decision in Mir Sarwar Jan v. Fakhruddin Mahomed¹ it has been held by the courts of India, Pakistan and Bangladesh that a guardian is not competent to create a liability on the minor or charge on the minor's estate by any executory contract for purchase of property. Although the contract in that case was relating to purchase, the decision was uniformly followed in the case of sales and mortgages as well². However, after the decision in Subrahmanyam's case when it is found that a competent guardian can bind a minor by a contract for sale of the minor's property for the latter's benefit, the courts have extended this decision to cover cases of purchase also. Relying on this Privy Council decision a Full Bench of the Hyderabad High Court by a majority judgment in Amir Ahmmad v. Meer Nizam Ali³ held that a contract for sale or purchase of immovable property entered into by the de jure guardian of a minor would bind the minor if it fulfilled the two tests of competency of the guardian and benefit of the minor. The same view was also held by Subba Rao, C.J., in Suryaprakasam v. Gangaraju⁴. But doubts are usually expressed whether necessity or benefit as may be found in the case of a sale could be found in the case of a purchase without involving

1 (1911) 39 IA 1 (PC).

2 Abdul Haq v. Yehia Khan AIR 1924 Pat 81; Swarath Ram v. Ram Ballabh AIR 1925 All 595; Srinath v. Jatindra AIR 1926 Cal 445; Ramakrishna Reddiar v. Chidambaran AIR 1928 Mad 407; Krishna Chandra v. Seth Rashabha AIR 1939 Nag 265.

3 AIR 1952 Hyd 120 (FB).

4 AIR 1956 AP 33 (FB).

the minor in any onerous obligation. In Ramalingam v. Bavanambal Ammal¹ Viswanatha Sastri, J., observed that the question which was vital to sales by a guardian, viz., necessity, could not arise in a contract for purchase; Govinda Menon, J., agreed with this obvious observation in Sitarama Rao v. Venkatarama Reddiar²; and a similar statement was made by Bhave, J., in Ramchandra v. Manikchand³. If a purchase actually fulfils the tests laid down in Subrahmanyam's case there is no point in invalidating the purchase⁴.

2.5. Promissory note and the liability of a minor's estate

We have already seen that a guardian cannot enter into contracts of loan making the minor or his estate liable direct to the creditor; but where necessities are supplied to the minor or where the liability of the minor is his personal law liability the creditor can proceed direct against the minor's estate under the rule of subrogation. Now the question arises: can the guardian execute a promissory note so as to be enforceable against the minor's estate? This question was discussed thread-bare⁵ in the Madras High Court in a series of cases, and very little in other High Courts, and was finally decided by the Indian Federal Court

1 AIR 1951 Mad 431.

2 (1956) 1 MLJ 5 (FB).

3 AIR 1968 MP 150.

4 Vi jaykumar v. Gokulchand (1964) 68 Bom LR 891; Popat Namdeo v. Jagu Pandu (1968) 70 Bom LR 456.

5 See Derrett's discussion on a shebait's promissory note in 'Promissory notes executed by shebait's' in (1966) KLT (Jour), 101ff.

in Sriramulu v. Pundarikakshayya¹.

Nowhere for the first time the law regarding a guardian's promissory note was better stated than in Swaminatha Odayar v. Natesa Iyer² where Reilly, J., sitting with Cornish, J., aptly put the question: 'how can any guardian impose a liability upon a minor by executing a promissory note on his behalf? If the promissory note is to effect anything, it must create an unconditional personal liability.' The learned judge held that the guardian of a minor could not impose a personal liability on the minor by executing a promissory note on his behalf even for necessary purposes, and drew a distinction between the liability arising from an ordinary debt and that arising from a debt secured by a negotiable instrument. It was observed that the special features of a promissory note distinguished it from a debt ordinarily incurred on behalf of a minor for necessary purposes, that a negotiable instrument was intended to be one which could pass from hand to hand bearing its meaning on its face, as itself the basis and evidence of a money claim. It was further observed that any qualification of the promise in a promissory note, such as that it would only be enforced against a minor if necessity binding on the minor could be shown, was wholly foreign to the idea of a negotiable instrument. Cornish, J., observed that the plaintiff had chosen to sue upon the promissory note and not upon the consideration,

¹ AIR 1949 FC 218.

² AIR 1933 Mad 710.

and the only liability under the promissory note was the personal liability of the minor defendant. The learned judge suggested that if the suit had been on the consideration, the case might have been different.

The correctness of this decision was considered by a Full Bench of the same High Court in Satyanarayana v. Mallayya¹ where Ramesam, J., who delivered the judgment observed:

"The doubt seems to arise because of the fact that the payee of the note can succeed against the minor and his estate only if certain facts are established. This is true. But I do not think this fact makes the liability under the promissory note one other than an unconditional personal liability. What is meant by that phrase is that the liability mentioned in the note should not be made contingent on some event, for if it is so made conditional or contingent upon the happening of some event it will not conform to the definition of promissory note. But so long as the form of the promissory note conforms to the definition of a promissory note under the Negotiable Instruments Act, it is not the less unconditional simply because when the matter goes to the court of law and the defendant raises some defence, the plaintiff has got to establish certain facts before he can succeed against the minor. The truth is that no transaction entered into by a guardian on behalf of a minor, can the opposite party succeed, if challenged, without establishing some facts such as that the transaction was for the benefit of the minor or some other fact. That such a fact has got to be established does not, in my opinion, make the liability under the promissory note a conditional liability. On the doubt entertained by Reilly, J., it follows that a promissory note on behalf of a minor is impossible. Such a view is opposed to the trend of all the decisions in the High Courts ... I am unable therefore to agree with the doubt suggested by Reilly, J."

¹ AIR 1935 Mad 447 (FB).

The learned judges of the Full Bench were not right in holding that the liability remains an unconditional one in spite of the fact that when the matter goes to a court of law and the defendant raises some defence the plaintiff has got to establish certain facts before he can succeed against the minor. The defence of necessity certainly affects the unconditional character of a promissory note, because the promise is that the amount will be payable on demand and on the face of it. Section 4 of the Negotiable Instruments Act (Act 26) of 1881 defines a promissory note as follows:

"A 'promissory note' is an instrument in writing (not being a bank note or currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument".

When a promissory note is executed by a guardian on behalf of a minor it does not remain a document containing an unconditional undertaking to pay a certain sum of money, because the undertaking is subjected to two conditions, viz., first, that the note is to be enforced against the minor if necessity is proved, and secondly, that the amount is not payable except out of the estate of the minor, the creditor being unable to proceed personally against the minor. The negotiable quality of a promissory note will be greatly affected by reading these conditions into it, and if any enquiry is permitted into the sufficiency of consideration, there will be really no undertaking to pay a certain sum. If the loan is considered on the promissory note alone, it will neither be enforced against the minor since he cannot

be bound personally by any contract, nor against the minor's estate directly by the holder in due course of the note since a creditor cannot proceed against the minor's estate unless the guardian has a proper right of indemnity against that estate¹. Again, if the power of a guardian in this respect is equated with that of a trustee it will be found that unless special power is given to him, money borrowed by the guardian on a promissory note even for the benefit of the estate is not a charge on that estate², and a decree cannot be passed against the minor's estate³. It is only by the application of the rule of subrogation that the minor's estate can be proceeded against, and when there is the rule of subrogation it cannot be said that the unconditional nature of a promissory note is maintained. Moreover, if the provisions of section 32 which provide that in the absence of a contract to the contrary, the maker of the note is bound to pay the amount to the holder on demand, of section 117(e) which provide for compensation to be paid in case of dishonour of a note, and of section 118 which presume the consideration of a promissory note, of the Negotiable Instruments Act are considered, it will be seen that when a promissory note binds a minor it puts him in an onerous obligation which according to the Privy Council decision in Waghela Rajsanji's case is void.

However, the question came before the Indian Federal Court in Sriramulu v. Pundarikakshayya⁴. The case being

1 Sanka Krishnamurthi v. Bank of Burma (1911) 35 Mad 692.

2 Ramanath Paul v. Kanai Lal Dey (1903) 7 CWN 104.

3 Byramji Rustomji v. Heerabai (1909) 2 IC 161 as quoted in Ammalu Ammal v. Namaqiri Ammal AIR 1918 Mad 300, 305.

4 AIR 1949 FC 218.

regarding the promissory note of a de facto guardian, Kania, C.J., confined his observations to the case of a de facto manager. But the other judges of the court did not make any difference between the power of a de jure and a de facto guardian in this respect and stated the law as applicable to both types of guardian¹. Fazl Ali, J., said that no guardian, much less a de facto guardian, could be allowed to involve the minor's estate in liabilities which might follow by a strict application of the somewhat stringent provisions of the Negotiable Instruments Act. According to the learned judge to give an undertaking on behalf of a minor that a certain sum would be paid on demand and that, in default of such payment, compensation would be payable was a somewhat onerous transaction, and a contract which exposed the minor and his estate to the risks involved in that transaction was void².

Mukherjea, J., observed that when money was borrowed on a promissory note the provisions of the Negotiable Instruments Act would undoubtedly be attracted. A promissory note being payable unconditionally on demand and having some other special features, viz., the presumption that it was made for consideration and that the holder of it was a holder in due course, there could be no suit on such a promissory note against the minor's estate if the guardian

1 AIR 1949 FC 218. Fazl Ali, J., 227; Mukherjea, J., 234; Mahajan, J., 263.

2 Ibid, 227.

excluded his personal liability under such promissory note. In other words, a guardian could not bind the minor's estate by executing a note on the minor's behalf. The learned judge said that if a promissory note was passed by the guardian who did not exclude his personal liability the holder of the note could have a decree against the guardian and if the guardian could succeed in proving that it was made for the minor's necessity, the creditor could avail himself of the guardian's right of reimbursement against the minor's estate. Thus it was pointed out by the learned judge that in a case of contractual debts borrowed either on simple bonds or promissory note the creditor could have a recourse to the minor's estate indirectly on the principle of subrogation, when the guardian had the right of indemnity against the estate of the minor, and that he would have the right of direct reimbursement out of the minor's property only when the debt was for necessities supplied to the minor. Through the rule of subrogation the learned judge attempted to bring about a harmony between Hindu law and the statutory law of contract when he said¹:

"In this way can effect be given to the personal law of the Hindus in respect of the liability of a minor's estate for debts contracted by the guardian for legal necessity without infringing in any way the basic principles of the law of contract, and in this way alone, the different pronouncements of the Judicial Committee mentioned above can be consistently explained".

1 AIR 1949 FC 218, 238.

Mahajan, J., also observed that a promissory note was a peculiar kind of document and by its very nature it imposed an onerous liability on the minor. Therefore on the note itself a minor could not be sued or a claim decreed against his estate. The learned judge further observed¹:

"If the guardian has given a promissory note, making himself personally liable, then, he can be sued on the note and he can then seek reimbursement from the minor's estate and that otherwise the note can be used as evidence of the debt. There is no liability on the promissory note; the liability, if any, is aliunde of the note, i.e., on the loan itself, if it is for the benefit of the estate or given for a pre-existing liability that has been discharged by a fresh borrowing taken for the purpose and evidenced by the note. Unless there is a cause of action independently of the promissory note which can sustain the action, the minor cannot be made liable".

As seen from the observations of the learned judges of the Federal Court a guardian cannot execute a promissory note on behalf of a minor². The minor's liability under Hindu law is a conditional one and, therefore, no unconditional undertaking can be given by him³. Even the promissory note cannot be used as evidence where the guardian has not been made a party to the suit and the equities between the guardian and the minor cannot be worked out by applying the principle of subrogation. In Appalaraju v. Yedukondalu⁴ Chandra Reddy, J., observed that where the debt had no independent existence apart from the promissory note, i.e.,

1 AIR 1949 FC 218, 263.

2 See Derrett, Introduction, 79 para 98.

3 Suryaprakasam v. Gangaraju AIR 1956 AP 33, 45 (FB); Appalaraju v. Yedukondalu AIR 1958 AP 713, 715.

4 AIR 1958 AP 713, 716.

where there was no interval of time between the two, the benefit of the equitable rule of subrogation could not be obtained and a decree could not be passed against the minor on the promissory note unless the guardian was made a party to the suit.

3. Natural guardians' powers of alienation under the Hindu Minority and Guardianship Act, 1956

In 1956 the Hindu Minority and Guardianship Act (Act 32) was passed as a supplement¹ to the Guardians and Wards Act of 1890 in order to amend and codify certain parts of the law relating to minority and guardianship among the Hindus only. We have seen earlier that the GWA was silent as to the powers of a natural guardian to deal with the minor's immovable property. The powers which were derived under the personal law were being exercised in accordance with the principles deduced from the sastric texts and their authoritative interpretation. It was firmly established by a long catena of judicial decisions that the natural guardian of a Hindu minor had the power to alienate the property in a case of need or for the benefit of the estate. Once the legal necessity was established it was not necessary for the natural guardian to apply under the GWA for the sanction of the court for an alienation of the minor's property; and the minor was bound by such alienation. As said earlier the provisions of section 27 of the GWA being of general application the powers of natural guardians

¹ HMGA, section 2.

were regulated by them in so far as they were not inconsistent with the personal laws of the minor. It is for the first time that the law relating to a natural guardian's powers with respect to a minor's estate has been specifically stated in any statute. Section 8 of the HMGA defines the powers of a natural guardian as follows:

- "(1) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant.
- (2) The natural guardian shall not, without the previous permission of the court,---
 - (a) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor, or
 - (b) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.
- (3) Any disposal of immovable property by a natural guardian, in contravention of subsection (1) or subsection (2), is voidable at the instance of the minor or any person claiming under him.
- (4) No court shall grant permission to the natural guardian to do any of the acts mentioned in subsection (2) except in case of necessity or for an evident advantage to the minor.
- (5)
- (6)"

Subsection (1) seems, from its language, to be a reproduction of section 27 of the GWA with an addition of the ratio of Waghela Rajsanji's case to it. Subject to the other provisions of the section, under this subsection a natural guardian may do all acts which are necessary or reasonable and proper for the benefit of the minor, or for

the realisation, protection or benefit of the minor's estate. This general power excludes fraudulent, collusive, colourable, speculative, unnecessary or unreasonable transactions¹. Wide as it may appear to some², this power has reduced the natural guardian to the position of a certificated guardian under section 29 of the GWA, with the little difference that in the case of the former the legal necessity of a transaction will still be decided by the minor's personal law. If the power of a guardian under the Hindu law was previously a limited and qualified power³, now under the HMGA it is doubly limited and doubly qualified one. Whenever the validity of a natural guardian's alienation of a minor's immovable property will be challenged before a court, the court will have to see, first, under subsection (1) by applying the principles of Hindu law whether the alienation has been done for legal necessity or benefit of the minor, and secondly, under subsection (2) whether the natural guardian has obtained previous permission from the court for the alienation. Under the GWA it was only the first qualification that a court was required to see in determining the validity of a natural guardian's alienation.

The restrictions contained in subsection (2) are similar to those placed by section 29 of the GWA. Previously under the GWA if a natural guardian obtained a certificate

1 Derrett, Introduction, 72 para 88.

2 Paras Diwan, Hindu law, 222.

3 Hunoomanpersaud's case (1856) 6 MIA 393.

of guardianship from the court he was not free from these limitations, and was required to obtain the permission of the court before being competent to transfer any property of the minor¹. Subsection (3) contains the provisions regarding the legality of transactions made in contravention of subsection (1) or (2). Section 30 of the GWA contains similar provisions, but there is difference between this section and the subsection of the HMGA. Under the former a transaction in contravention of section 28 or 29 is voidable at the instance of any other person affected thereby², while under the latter any disposal of immovable property by a natural guardian in contravention of subsection (1) or (2) is voidable at the instance of the minor or any person claiming under him. Subsection (4) enjoins upon the court not to grant permission except in case of necessity or for an evident advantage to the minor. Section 31(1) of the GWA contains similar provisions. This subsection has taken away from a natural guardian the burden of judging whether a particular transaction is in the interest of the minor or not, and cast it on the court.

1 Surut Chunder v. Ashootosh (1875) 24 WR 46 (CR); Ram Chandar v. Chheda Lal (1905) 2 All LJ 460, 464; Das Ram v. Tirtha Nath (1924) 51 Cal 101, 106; Rameshwar v. Ridh Kuer AIR 1925 Oudh 633; Jai Narain v. Bechoo Lal (1938) All 614.

2 Girraj Baksha v. Kazi Hamid Ali (1887) 9 All 340; Raj Lakhi v. Debendra (1897) 24 Cal 668, 671; Dattaram v. Gangaram (1899) 23 Bom 287; Sinaya v. Munisami (1899) 22 Mad 289; Shankerbhai v. Raisingji (1917) 19 Bom LR 855; Dwijendra v. Manorama (1922) 49 Cal 911; Chiranji Lal v. Syed Ilias (1924) 46 All 620; Labh Singh v. Shahban Mir (1926) 7 Lah 129; Hussain Sahib v. Ayesha Bibi (1941) Mad 775 (FB).

3.1. Sale by natural guardians under the HMGA

Bhave, J., observed in Ramchandra v. Manikchand¹ that after the passing of the HMGA the authority of the natural guardian even to transfer the minor's property for legal necessity was taken away. Such transfers could now be effected only after obtaining the sanction of the court. In Re Lalitha Bai² Jagadisan, J., thinks that the guardian has no power to do anything to the prejudice of the minor; none of his acts can bind the minor and none of his acts can receive the approval of the court, if it does not result in some advantage to the minor, 'actual or prospective, but material and real'. Actually under the HMGA he has not the scope to do anything with respect to the minor's immovable property unless previously permitted by the court to do so. The court has taken upon itself the previous privilege of a guardian to deal with the minor's property "as carefully as a man of ordinary prudence would deal with it if it were his own"³. The words of the provisions of subsection (2) being mandatory, any transaction of a natural guardian without the previous permission of the court must suffer from the mischief or consequence of subsection (3), even if the transfer is found to be beneficial to the minor⁴. The restrictions contained in section 8, however, do not apply

1 AIR 1968 MP 150, 155.

2 AIR 1961 Mad 153, 156.

3 GWA, section 27. Although the latter portion of this section has been included in section 8(1), this portion is left out.

4 Prabhakaran Pillai v. Kumar Pillai (1971) KLT 32 (SN).

in respect of the undivided interest of a minor in joint family property¹. Bhagwati, J., observed in Re Krishnakant² that the entire scheme of the Act showed that the concept of a guardian in respect of the undivided interest of a minor in joint family property was excluded from the scope and purview of the Act, and that the Act did not contemplate and deal with any guardian in respect of the undivided interest of a minor in joint family property. The manager of a joint Hindu family can alienate the joint family property including the interests of minor coparceners therein without obtaining the previous permission of the court even if the manager happens to be the natural guardian of the separate property of any one or more of the minor coparceners. But the alienation must be justified under Hindu law. Thus when a mother and her minor son constitute a joint Hindu family³, each with a moiety of the undivided interest in the house belonging to the family, the mother cannot alienate the minor's interest in the house in any case. It presents a peculiar situation under which the mother can neither sell as manager, as she cannot be a manager because of her being a non-coparcener⁴, nor can she sell as natural guardian because the court, other than the Original side of certain High Courts, has no jurisdiction over the undivided interest of a minor

1 Sugga Bai v. Smt. Hiralal AIR 1969 MP 32.

2 AIR 1961 Guj 68, 72.

3 Buddanna v. Commissioner of I.T., Mysore AIR 1966 SC 1523.

4 Commissioner of I.T. v. Seth Govindram Sugar Mills AIR 1966 SC 24.

and consequently cannot give her permission for sale. This situation occurs only in cases where the mother and not the father acts as natural guardian of minors. Faced with such a problem R.N. Misra, J., in Sunamani Dei v. Babaji Das¹ without showing any regard to the Supreme Court decision in Commissioner of I.T. v. Seth Govindram Sugar Mills² treated the mother as if she were a manager and determined the validity of her transfer of the minor's interest in joint family property by the principles of Hindu law. In Venkataramanamurthy v. Subbayamma³ Ekbote, J., missed the point for his conscious persistence to see the mother as natural guardian and not in any other character. The learned judge rightly pointed out that the provisions of the HMGA did not apply where the mother acting as the natural guardian of her minor sons sold the undivided interests of the minors in a joint family property; but he erred when he said that the mother as natural guardian could sell the undivided interests of her minor sons in the joint family property if she acted in the interest of the minors and for their benefit. How could she do it when the court cannot give her permission to sell, nor she can act as manager, and when, as the learned judge said, section 11 of the HMGA has no application?

For a fair solution of such a problem either the Indian Parliament should come forward with an amendment of section 6

1 AIR 1974 Ori 184.

2 AIR 1966 SC 24.

3 (1966) 1 An WR 368.

or 8(2), or the Indian Supreme Court should overrule its own decision by treating such a woman as manager, an idea propounded by a writer of learning¹.

3.2. Purchase by natural guardians under the HMGA

The word 'purchase' has not occurred in section 8 of the HMGA. Therefore, the courts think that the natural guardians do not require the permission of the court when they purchase any property for the minors. In Radheshyam v. Kiran Bala² it was held that for the purchase of a property for a minor no permission of the court was necessary; and where a guardian purchased property for the minor the minor would be bound by that purchase unless it bound the minor personally or imposed a personal liability on the minor. The same view is also expressed by the courts in respect of contracts for purchase, and the Anglo-Hindu law is applied³. In Lingo Reddy v. Ramchandrappa⁴ Malimath, J., observed that since purchase did not come within section 8(2), the natural guardian was not required to obtain previous permission of the court to enter into a contract of purchase of immovable property provided the conditions specified in section 8(1) were satisfied. Bhawe, J., in Ramchandra's case⁵ is not correct when he believes that no contracts of natural guardians, whether for sale

1 Derrett, 'May a Hindu woman be the manager of joint family at Mitakshara law?' in (1966) 68 Bom LR (Jour), 1-11, the same, Critique, 117-121 paras 149-153.

2 AIR 1971 Cal 341.

3 Derrett, 'A Hindu law miscellany, 1971' in (1971) 73 Bom LR (Jour), 78-83, 79.

4 (1971) 1 Mys LJ 159.

5 AIR 1968 MP 150, 155.

or purchase of property, can be enforced if no permission of the court is obtained. In Than Singh v. Barelal¹ a contract for purchase of some agricultural lands and a house was entered into by the father of a minor. The trial court raised the question inter alia whether the father-guardian had obtained permission from the court for acquiring the property for the benefit of the minor, and dismissed the suit for the absence of any such permission. But on appeal the Madhya Pradesh High Court held that there was no necessity for permission in the case of purchase where the purchase was for the benefit of the minor. Oza, J., who delivered the judgment of the Division Bench, said that there was no such law where such permission was necessary when a father-guardian acquired property for his minor son's benefit. In Golconda Industries Private Ltd. v. Registrar of Companies² the question arose whether a guardian could bind the minor by a contract for the purchase of shares. The facts show that the appellant company allotted a number of shares to certain persons including some minors. The Registrar declined to register the return submitted by the company for the inclusion of minors as shareholders. The company claimed that the minors were given shares because the contracts were entered into by their guardians. The counsel for the appellant company argued on the authority of the Privy Council decision in Subrahmanyam's case that

1 AIR 1974 MP 24.

2 AIR 1966 Delhi 170, 172 (FB).

guardians could enter into contracts on behalf of their minors if the contracts so made were (1) within the competence of the guardians, and (2) for the benefit of the minors. He also drew further support for his argument from section 8(1) of the HMGA which empowers the guardians to do all acts which are necessary or reasonable and proper for the benefit of the minor or for realisation, protection or benefit of the minor's estate. The respondent's counsel argued that section 8(1) of the HMGA did not allow guardians to bind the minors in any case by a personal covenant; therefore allotment of shares to the minors through their guardians' contract was beyond the powers of guardians. Kapur, J., in delivering the judgment of the Full Bench abstained from expressing any opinion on the question. It may, however, be said that the respondent's counsel's argument is more convincing on the ground that guardians were not competent to bind the minors with any personal liability, even though the shares were for the benefit of the minors. The question would have been a little different if the purchase was of fully paid shares or stocks and if they were for the minors' benefit, as there would have been no personal liability on the minors. But that too was dependent on whether the guardians were competent to invest minors' money in such securities. In the case of trustees the court does not allow them to invest , in the absence of any special investment clause in the instrument of trust, in any securities other than those mentioned in section 20 of the

Trusts Act of 1882. If the personal liability of the minors is considered in the light of the Federal decision in Sriramulu's case or the Privy Council decision in Waghela Rajsanji's case it can be said that the guardians could not bind the minors by such contract for the purchase of shares.

C H A P T E R I I I

ALIENATION BY DE FACTO AND TESTAMENTARY GUARDIANS UNDER HINDU LAW

1 De facto guardianship

1. 1 Who is a de facto guardian?

Derrett says that a de facto guardian is a "major who takes a continuous interest in the welfare of the minor and handles his property without any authority of law --- in fact he or she is self-appointed"¹. Marten, C.J., thought in Harilal Ranchhod v. Gordhan Keshave² that before a person could be described as a de facto guardian there must be some course of conduct in that capacity. In the same case Crump, J., considered him to be a person who being neither a legal guardian nor a guardian appointed by court assumed the management of the property of a minor as though he was a guardian, and agreed with Marten, C.J., by observing that the term 'de facto' implied 'some continuity of conduct, some management of the property' beyond the isolated act of sale that came to be questioned in a particular suit. Wadsworth, J., observed in Hanumayamma v. Lakshmiddevamma³ that the term 'de facto' literally meant 'from that which has been done' and that this 'basic conception

¹ Derrett, Critique, 174 para 224.

² AIR 1927 Bom 611.

³ AIR 1938 Mad 950.

of past acts resulting in a present status' led to hold that a person became a de facto guardian as a result of a course of conduct. In China Alagum Perumal v. Vinayagathammal¹ Devadoss and Mackay, JJ., observed:

"A de facto guardian is one who looks after the property of the minor and generally acts in his interests for the time being. A fugitive or an isolated act of a person with regard to the minor's property would not make him a de facto guardian of the minor, nor would staying with a minor for a time make him a de facto guardian. There must be a continuous course of conduct as guardian of a minor in regard to his property in order to enable one to become a de facto guardian. The length of the period required to constitute one a de facto guardian would depend upon the circumstances of each case. The first act of intermeddling with the estate of a minor would not be the act of a de facto guardian, if he had not become one before the act, nor would the subsequent management of the estate of the minor by such person make the first act, which is one of alienation, the act of a de facto guardian".

The observation of the learned judges in China Alagum's case shows that even though a person acts continuously as a guardian his first act would not be considered as that of a de facto guardian. If this situation is recognised, if the position of a de facto guardian rests only on acts of intermeddling, and if it is a position which has only to be built up by a series of acts, the first of those acts would, by itself, not be an act of a person who was already in the position of a de facto guardian before that act was done. And a de facto guardian would be a person who is already a guardian owing to something

¹ AIR 1929 Mad 110.

which has happened previously; and to hold otherwise would be tantamount to admitting that a person buying property from a minor's estate or paying debts to the minor's estate can recognise anybody he likes with impunity as the guardian, provided that the person comes to be recognised as the guardian de facto of the minor subsequently. But there are obvious difficulties in the way of the application of the above statement of a rule of law mainly because there may be circumstances in which the first formal act of the de facto guardian would be one which the court might rightly recognise as binding on the minor, for example, a case in which the position of the de facto guardian has been recognised in the family before any intermeddling act of a formal nature affecting the minor has been accomplished. The question should therefore be whether in the eye of the family of the minor and those interested in the welfare of the minor, the person who makes an alienation or receives a payment is, at the time of the transaction impeached, regarded by common consent as the person who is entitled to act on behalf of the minor. If there is such recognition, then once the person recognised has consented to act as guardian, it would not be necessary to wait for a series of transactions in the capacity of a guardian to clothe that person with authority to represent that estate¹. If the intermeddler

¹ Hanumayamma v. Lakshmiddevamma AIR 1938 Mad 950, 952.

is a self-constituted guardian who comes into being for the purpose of carrying out an isolated transaction, and if that transaction is of a very doubtful advantage to the minor's estate, then there could be no such general recognition of that guardian as would clothe him with authority and there could be no such course of conduct as would supplement the general recognition. Indeed, the question is essentially one of fact.

In Sriramulu v. Pundarikakshayya¹ Kania, C.J., observed:

"In law there is nothing like a de facto guardian. There can only be a de facto manager, although the expression 'de facto guardian' has been used in text books and some judgments of courts".

In the same case Mahajan, J., observed that the phrase 'de facto guardian' was a loose phraseology for the expression 'de facto manager' used in Hunoomanpersaud's case, and that this phrase was not known to any text of Hindu law. The learned judge drew a distinction between a de facto guardian and an intermeddler by bringing under the former only the relations of a minor and under the latter, his friends when it is said²:

"It (the phrase de facto guardian) aptly describes the relations and friends who are interested in the minor and who for love and affection to him assume superintendence over his estate. A father may not necessarily be the guardian of an illegitimate child, but his de facto guardianship cannot be repudiated. Such is the case of the natural father of an adopted son, ... A person who is not attached to the minor by ties

¹ AIR 1949 FC 218, 221.

² Ibid, 251.

of affection or other reasons of affinity and remains in charge of his estate is in truth a mere intermeddler with his estate".

The learned judge, however, prescribed that in order to come within the scope of the rule in Hunoomanpersaud's case it was necessary that a de facto guardian must have a course of conduct in the capacity of a manager.

Mukherjea, J., in Sriramulu's case beautifully summarised the status and the legal competency of a de facto guardian when he observed¹:

"It is scarcely possible to define the circumstances under which a man could be regarded as a de facto guardian with regard to the properties of a minor. Existence of near relationship between such person and the infant cannot be insisted upon as a matter of law; nor can the courts scan minutely the motives which actuated him in assuming the responsibilities of management except so far as such motives are manifested by outward acts. It cannot be said also for what period of time he must act as manager before a person can be recognised as a de facto manager or guardian of a minor's estate. Undoubtedly, law should never encourage an officious intermeddling with the estate of a minor and if Hindu law has given a legal recognition to the de facto guardian, it has given it only in the interests of the minor himself. As the law stands at present, if a person is not what is called an 'ad hoc' guardian and does not pose as a guardian for a particular transaction only but is found to be managing the property of an infant in the same way as a de jure guardian would, he could be described as a de facto guardian, although he is neither a natural guardian nor a guardian appointed by court".

Viswanatha Sastri, J., expressing the impossibility of setting any definite rule according to which a person

¹ AIR 1949 FC 218, 233.

could be recognised as a de facto guardian observed in Palaniappa Goundan v. Nallappa Goundan¹;

"It would be difficult to say as to whether a person who posed as a guardian in respect of a particular transaction affecting the minor's estate was a guardian ad hoc, or a guardian 'de facto'. It is not possible to fix any period of time during which a person must have managed a minor's estate before he can be recognised as 'de facto' guardian or manager. Nor is it possible to formulate any precise course of conduct in reference to the management of the minor's estate as being necessary to create a 'de facto' guardianship. The leasing out of the properties of the minor, the collection of rents and profits, the payment of Government revenue, the maintenance of the minor, the discharge of debts binding on the estate and similar acts spread over a substantial period of time might constitute the manager of the minor's estate a 'de facto' guardian. ... But no definite rule can be laid down as to what acts constitute 'de facto' guardianship".

In Palani Goundan v. Vanjiakkal² Ramaswami, J., sitting with Govinda Menon, J., said that a de facto guardian was one who was not a legal guardian in the sense that he was either a natural or a testamentary or a certificated guardian, but who being interested in the minor, though a stranger, took charge of the management of the minor's property, and that in order to enable one to become a de facto guardian, there must be a continuous course of conduct as guardian of the minor in regard to the latter's property; the length of the period required to constitute one a de facto

1 AIR 1951 Mad 817, 819.

2 AIR 1956 Mad 476.

guardian was dependent upon the circumstances of each case. It was considered by the learned judge that the first act of intermeddling with a minor's estate would not be the act of a de facto guardian, unless he had become such a guardian before that act, and that the subsequent management of the minor's estate by him would not make the first act which could be one of alienation of the minor's property, an act of a de facto guardian. This complete exclusion of a de facto guardian's first act from being considered as an act of a de facto guardian cannot be agreed with. As we have said earlier there may be circumstances in which the courts would be right to recognise the first act of a de facto guardian as binding on the minor. If before effecting his first intermeddling transaction a person is recognised as a de facto guardian by the common consent of the minor's family or of those interested in the minor's welfare, there is little reason why it would not be considered as the act of a de facto guardian. In delivering the judgment of a Division Bench in Bajamoni Debi v. Paramoni Debi¹ Das, J., rightly observed that once a person was found on the facts and in the circumstances to be a de facto guardian, he must be taken to have been a de facto guardian right from the commencement itself; the acts

¹ (1956) Cut 362, 365-66.

relating to the commencement period should not be isolated and treated as being without authority.

In the case of a family settlement and a partition arrangement, distinguished from an act of alienation or act of borrowing, Ramamurti, J., said in Govindaswamy v. Sakunthala¹ that it was not necessary that the de facto guardian of a minor should have managed the property of the minor for a continuous period of time; the validity or binding effect of his act in such cases would have to be judged with reference to the particular facts of the case and the setting and background in which they were entered into.

A de facto guardian is, therefore, a person who is not a legal guardian², or who does not come under any of the categories given in section 4 of the HMGA, but who takes charge of the properties or affairs of a minor³. Section 4 of the HMGA provides:

"In this Act,---

(a)

(b) 'guardian' means a person having the care of the person of a minor or of his property or of both his person and property, and includes ---

(i) a natural guardian;

(ii) a guardian appointed by the will of of the minor's father or mother;

(iii) a guardian appointed or declared by a court; and

(iv) a person empowered to act as such by or under any enactment relating to any court of wards;

1 (1966) 2 Mad 414.

2 Rajalashmi v. Ramachandran (1966) 2 MLJ 420, 423.

3 Narain Singh v. Sapurna Kuer AIR 1968 Pat 318.

(c) 'natural guardian' means any of the guardians mentioned in section 6".

Section 6 states:

"The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint-family property), are ---

(a) in the case of a boy or unmarried girl --- the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in the case of an illegitimate unmarried girl --- the mother, and after her, the father;

(c) in the case of a married girl --- the husband;

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section ---

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

Explanation: In this section, the expressions 'father' and 'mother' do not include a step-father and a step-mother.

Previously under section 4(2) of the GWA the expression 'guardian' was used to include within its meaning all classes of guardians. Thus as it was applied to include natural, testamentary and court appointed guardians¹ so also

¹ Dayabhai v. Bai Parvati (1915) 39 Bom 438; Dip Chand v. Munni Lal (1929) 52 All 110, 113; Damodar Das v. Mst. Jatti (1927) 8 Lah 306; Noshirwan v. Sharoshbanu (1934) 58 Bom 724, 728; Deputy Commissioner v. Nawab (1935) 10 Luck 141, 146; Jeeban Krishna v. Sailendra Nath (1946) 1 Cal 259, 277; Rajarajeswari v. Sankaranarayana (1948) Mad 351, 357.

to include de facto guardians¹. And as seen from the above sections the HMGA does not say anything about a de facto guardian. Obviously under section 2 of the HMGA the previous connotation of the word 'guardian' as developed under the GWA could be imported, and a de facto guardian would be included under section 4(b) of the HMGA.

Regarding the appointment of a de facto guardian Derrett says²:

"There is no positive obligation upon a de facto guardian to seek appointment by the court and most such guardians function in cases where the expenses of seeking appointment are not justified by the size of the minor's estate".

But he rightly suspected that "where a well-to-do minor's affairs are managed by a de facto guardian who does not seek appointment there are grounds for suspicion that his motives are not disinterested, as a guardian's must be".

Under Hindu law a stepmother, brother, uncle and all relations other than father, mother or husband may act as de facto guardians³, if they voluntarily place themselves in charge of the person or property of the minor. Sometimes a minor may have a de facto guardian for the disposition of his property, even when the natural,

1 Sitha Bai v. Radha Bai AIR 1919 Mad 189; Prem Kaur v. Banarsi Das (1934) 15 Lah 630, 636; Great American Insurance Co. Ltd. v. Madanlal (1935) 59 Bom 656, 662; Abaji Ganesh v. Damodar AIR 1938 Nag 399; Kailash Chandra v. Rajani Kanta AIR 1945 Pat 298.

2 Introduction, 84 para 109.

3 Thayammal v. Kuppana Koundan (1914) 27 MLJ 285.

testamentary or court appointed guardian exists but the latter neglects the interest of the minor at the material times¹.

In justifying the position of a de facto manager Kania, C.J., said in Sriramulu's case that a Hindu de facto managership was a solution by the law out of two different situations. First, when a Hindu minor had no legal guardian there would be no one who could handle and manage his estate lawfully, therefore, unless someone was deemed to have such authority, the minor would not receive any income or returns from his estates. Secondly, a person having no title could not be permitted to intermeddle with the minor's estate so as to cause a loss to the minor. The learned Chief Justice stated further that this solution was of universal application when he said²:

"Minors of all communities and everywhere have to face these difficulties. There appears to me no justification for treating the minors of different communities on different principles for the safety of the minor's estate, unless the personal law of the minor justified such a distinction".

The earliest case in which the position and power of a de facto guardian are acknowledged in Hindu law is the well-known Hunoomanpersaud's case on which subsequently innumerable decisions are based. Their Lordships of the

1 Mayilswami Chettiar v. Kaliammal (1969) 1 MLJ 177.

2 AIR 1949 FC 218, 222.

Privy Council observed in that case¹:

"It is to be observed that under the Hinoo law, the right of a bona fide incumbrancer who has taken from a de facto Manager a charge on lands created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a de facto and de jure manager) affected by the want of union of the de facto, with the de jure title".

Mahajan, J., observed in Sriramulu's case² that the rule laid down in Hunoomanpersaud's case regarding the powers of a de facto manager of a minor's estate was based on Hindu system of jurisprudence, and that the rule had application to cases of both relations and friends who assumed management of the minor's property and who had some connection with the family, and did not apply to utter strangers and intruders. The acts of necessity performed by such relations and friends to safeguard the minor's estate were binding on the minor's estate. It was pointed out that if such persons³ to whom the law including the statute⁴ showed preference in the matter of appointment of guardianship without formally getting themselves appointed by the court, assumed out of affection charge of the estate of a minor and took upon themselves management of it, paid the revenues, realised rents, located tenants, maintained

1 (1856) 6 MIA 393, 412.

2 AIR 1949 FC 218, 251-53.

3 For example, natural father of an adopted son. In Krishnamurthi v. Krishnamurthi AIR 1927 PC 139 the natural father of an adopted minor son acted as de facto guardian and entered into an agreement on the minor's behalf.

4 Section 19(b), GWA, 1890.

the minor and did all other acts of management and the courts and other relations stood by and recognised them as such, they should not be treated as officious inter-meddlers with the estate. The learned judge posed the question: "Can they not be aptly and appositely described as de facto guardians of minor's person and de facto managers of his estate?", and then observed that it was the position of such managers that was recognised in Hunoomanpersaud's case, and their acts in the management of the estate, provided they were for the protection of the estate or for the benefit of the minor's estate, were recognised as valid, the test being necessity and not the authority that they possessed¹. Mukherjea, J., very tersely put the law of de facto guardianship in a single sentence when he said²:

"The de facto guardianship is essentially a creature of necessity and he could claim no legal recognition beyond what necessity actually warrants".

Derrett also says³:

"The want of an appointment was not considered, in the celebrated leading case of Hunoomanpersaud, to have any bearing on the binding character of his or her acts, if the circumstances justified them".

1.2. Sastric basis of de facto guardianship

Although the specific phrase 'de facto guardian' is not known to any text of Hindu law, there are certain

1 Emphasis is mine.

2 Sriramulu v. Pundarikakshayya AIR 1949 FC 218, 233.

3 Critique, 174 para 224; see also the same Appendix II, 425-432.

sastric texts which empower a person other than a father, mother or husband, in other words persons other than legal guardians, to alienate a family property in which minors may have interests. As we have said earlier, verses 27 to 29 of the Mitakshara contain the law relating to the alienation of joint family property by the father, and these verses excluding verse 27 but including verse 30 were referred to during arguments in Hunoomanpersaud's case¹ and they have been considered ever since the decision in that Privy Council case to be the basis of the law of alienation by minors' guardians². Verse 27 states that the father of a joint family consisting of his minor sons has an independent power of disposal of family effects other than immovable property for indispensable acts of duty and for purposes prescribed by the text of Hindu law, such as gift of affection, support of the family, relief from distress and so forth; but he has no such independent power to dispose of the immovable estate of the family, whether acquired by himself or inherited from his father or other predecessor, he can dispose of such property by gift or sale only with the consent of all the sons. Verse 28 contains the text of Brihaspati which provides an exception to the above inhibition against the disposal of immovable joint family property;

1 Authorities cited before their Lordships are listed at page 407 of the judgment. In Benares Bank's case AIR 1932 PC 182 Sir Dinsha Mulla stated that verses 27 to 29 were relied on in Hunoomanpersaud's case, and in Sriramulu's case Mahajan, J., said that those verses plus verse 30 were referred to in the argument before the Privy Council; but the report of the judgment shows that only verses 28 to 30 were referred to. See page 407 of the judgment.

2 Benares Bank's case AIR 1932 PC 182, 185; Sriramulu's case AIR 1949 FC 218, 236 per Mukherjea, J.

and verse 29 gives the meaning of that exception. According to that meaning when the sons and grandsons, or unseparated brothers are minor and incapable of giving their consent to alienation of immovable joint family property, even one person who is capable, i.e., either the father or a capable brother, may conclude a gift, mortgage or sale of that property if a calamity affecting the whole family requires it, or the support of the family renders it necessary, or indispensable duties, such as the obsequies of the father or the like, makes it unavoidable. Verse 30 provides that among unseparated kinsmen, the consent of all is indispensably requisite to make a gift, sale or mortgage, but it is not required when there is a single owner or the kinsmen are separated where a valid transaction can be effected without any consent.

All the verses contain the law relating to the disposition of joint property of a family wherein some of the members or coparceners may be minors and consequently incapable of giving consent to an alienation of the family property, but the managing member of the family who can effectively dispose of the family property if any of the emergent situations arises, is not a stranger or a person having no interest in the family property. It is difficult to agree with Mahajan, J., in Sriramulu's case when he observes¹:

"These quotations (i.e., verses from 27 to 30) from Mitakshara are authority for the proposition

1 AIR 1949 FC 218, 249.

that under the Hindu system even persons having no lawful authority can effect sale and mortgages and gifts of property belonging to others in certain emergent situations. This kind of power is wholly unknown in other systems of jurisprudence".

The proposition that under the Hindu system persons having no lawful authority can effect sale, mortgage and gift of property belonging to others in emergent situations can hardly be corroborated by the contents of those verses. The property dealt with in those verses being joint none of the coparceners has any individual property in it until it is partitioned by metes and bounds¹, and the father or where the members are brothers, a brother alienates the interests of the minor sons, grandsons or brothers, as the case may be, in that property as the managing member of the family. In such cases consent of incapable members is presumed and law imputes authority in the alienating coparcener. They are not cases of alienations without authority. Moreover, as Strange points out², the power of alienation and the order of preference in the alienation of movable and immovable property as contained in the verses are "precisely the insinuation of the Roman law, in the case of an inofficious testament". Even verse 30 does not indicate that a separated or unseparated kinsman disposes of the interest of other members including the minor coparceners of the family, it implies that the alienor transfers or alienates his own share or interest in the property.

1 Derrett, Introduction, 322 para 523; Phoolchand v. Gopal Lal AIR 1967 SC 1470 per Wanchoo, J.; Puttrangamma v. Ranganna AIR 1968 SC 1018.

2 Hindu law Vol. 1 (1830 ed.), 19.

However, the following sastric texts provide that in extreme cases of emergency a person, either a member or a dependant anyway connected with the family, may incur a debt for family necessity and the family head would be bound by the contract for that debt:

"When a debt has been incurred, for the benefit of the household, by an uncle, brother, son, wife, slave, pupil, or dependant, it must be paid by the head of the family".
(Bri. XI. 50; SBE Vol. 33, 329)

"Should even a dependant effect a transaction for the benefit of the family --- in the absence of his master, for the maintenance of the family --- whether in his own country or abroad, the superior --- viz., the master of the dependant --- should not question it".
(Manu VIII. 167; Derrett, Bharuci Vol. 2, 146)

"Such debts of a son as have been contracted by him by his father's order, or for the maintenance of the family, or in a precarious situation, must be paid by the father".
(Nar. I. 11; SBE Vol. 33, 45)

"What has been spent for the household by a pupil, apprentice, slave, woman, menial, or agent, must be paid by the head of the household".
(Nar. I. 12; SBE Vol. 33, 45)

"(A debt of which payment has been previously) promised must be paid by the householder;
(Vis. VI. 38; SBE Vol. 7, 45)

"And (so must he pay that debt) which was contracted by any person for the behoof of the family".
(Vis. VI. 39; SBE Vol. 7, 45-46)

"A debt incurred for the (purposes of the) family by the slaves, the wife, the mother, the pupil or the son (of the head of the family) even without his consent when he is gone abroad should be paid (by the head of the family).
This is (the view of) Bhrgu.
(Katya. 545; Kane, Katyayansmrti, 226)

The above texts clearly show that a debt could be contracted besides the managing member of a family by an

unauthorised person in circumstances of distress and calamity or for emergencies or for maintenance of family or for meeting the expenses of a marriage, but the unauthorised persons are in no way wholly strangers. They are connected with the family and interested in its welfare. The extent of authority of a guardian either de jure or de facto over the property of a minor had not been a specific subject of discussion by any of the Hindu smrti writers. It is, however, clear from the above texts that the sastric Hindu law did recognise the rights of a de facto manager of the family and even of an individual member who was not in the position of a manager to alienate family property or to contract debts in times of distress or to meet family necessities. The idea apparently is that the necessity itself creates authority in the person who otherwise would have no authority to alienate a property belonging to the family or to contract debts on its behalf. A sort of implied agency is recognised throughout the above texts. The rule of section 68 of the Contract Act (Act 9) of 1872 is in conformity with these texts, but probably the texts have a wider scope than the principle enacted in the section. Under the texts a principal becomes liable for the debts contracted by a number of unauthorised persons during his absence or when he was disabled, imprisoned or afflicted with disease; even a father is liable to pay the debts of his son contracted for the support of his family or in time of distress.

As said earlier the sastric Hindu law maintained a difference between ancestral debts and personal debts, i.e., debts incurred for the minor's personal and family necessity and for the benefit of his estate, in other words, debts covered by the principle of section 68 of the Contract Act. A minor, so too his guardian, was not expected to pay the former, but he or his guardian had to pay the latter. When a man died involved in debts and was survived by two minor sons and there was no adult representative of the deceased, the creditors could not bring an action against the minor sons for the realisation of their ancestral debts before one of them attained majority. It was only at the expiration of the term of minority the son or sons of a deceased were bound to discharge the obligations of their ancestor¹; and in no circumstances were the minors answerable for such obligation during their minority, since they could not exercise any power over the patrimony until they came of age². So long as minority of sons continued the property left by a deceased could not be sold for the liquidation of any debt which the deceased might have contracted³. When, however, a mother borrowed money to meet the necessary expenses of her minor son she could execute a bond in favour of the creditor for the debt in the name of her son⁴, and the bond was binding on the

1 Macnaghten, Hindu law Vol. 2, 287-288 case 11.

2 Ibid, 277 case 1.

3 Ibid, 288 f.n.; see also the same Hindu law Vol. 1, 110.

4 Ibid, 289 case 13.

minor. She could also effect a sale of her minor son's ancestral immovable property for the purpose of maintaining her son and liquidating the arrears of revenue due to the government¹, or simply for the purpose of procuring the necessities of life².

None of the sastric texts quoted above was referred to before the Privy Council in Hunoomanpersaud's case³. Their Lordships referred only to Colebrooke's translation of Jagannatha's Digest Vol. 1, 302 and Gopee Churun Burrall v. Mussummat Ishwuree Lukhee Dibia⁴ in considering the binding effects of ancestral debts on the minor and his estate. That page of the Digest Vol. 1 contains two verses --- one by Katyayana and the other by Narada. Their Lordships indicated that even if the charge in that case was taken not to have been created by the minor's mother as guardian, the minor would still be liable according to the principles contained in those two verses and the ratio of the alleged case. Their Lordships looked into the liability of the descendants to pay the debts of their ancestors, but they did not take into consideration that such liability was a qualified one⁵. Such debts are not required to be paid immediately; only debts which are contracted for the support

1 Macnaghten, Hindu law Vol. 2, 294 case 2.

2 Ibid, 310 case 19.

3 In Sriramulu's case Mahajan, J., observed that reference was made in the Privy Council decision to Jagannatha's Digest Vol. 1 verses 189 to 193 wherein some of these verses are annotated. But the verses mentioned by the learned judge are contained in pages 293 to 296, while the only reference made to that volume of the Digest in the whole judgment is page 302 [see page 413 of (1856) 6 MIA 393] and at page 407 of the report where the authorities cited before their Lordships are listed reference is made to Jagannatha's Digest Vol. 2, pages 265, 270, 284, 319 wherein none of these verses could be seen.

4 (1821) 3 Sel. Rep SDA 124 (NE).

5 Kane, Dharmasastra Vol. 3, 446, 450.

of the family are expected to be paid without any delay¹.

Katyayana says²:

"A debt incurred by the father, if he is afflicted with disease or has gone abroad, shall be paid by the sons after the twentieth year, even when the father is living".

Narada says³:

"The father, uncle, or eldest brother having gone abroad, the son, (or nephew, or younger brother) is not bound to pay his debt before the lapse of twenty years".

Vishnu says⁴:

"If he who contracted the debt should die, or become a religious ascetic, or remain abroad for twenty years, that debt shall be discharged by his sons or grandsons".

Again, a minor need not pay his ancestral debts during his minority but when the proper time to pay comes, i.e., after the attainment of majority, he must pay the debt, otherwise his ancestors may remain in hell⁵. Katyayana says⁶:

"(A son need) never pay (the debt of his father) when the father is dead, if he (the son) has not attained years of discretion. But when the proper time (to pay the debt) comes, he must pay according to the law, otherwise his forefathers may remain in hell. (Katya. 552)

"If (a son) has not reached (years of) discretion, he, though independent, is not liable for the debt (of the father). (Real) independence is understood to belong to one who is senior and seniority is due to the (attainment of) certain qualities and age". (Katya. 553)

Sastric law suspended the liability of a minor for his ancestral debts. The minor was under no obligation to

1 See Jagannatha's comments on verse 181 in Digest Vol. 1, 284-85.

2 Katya. 548; Kane, Katyayansmṛti, 227.

3 Nar. I. 4; SBE Vol. 33, 46.

4 Vis. VI. 27; SBE Vol. 7, 44-45.

5 Kane, Dharmasastra Vol. 3, 446.

6 Kane, Katyayansmṛti, 227-28.

pay his ancestors' debts till he attained the age of majority; and no one was allowed to pay them on the minor's behalf out of the minor's property, since a minor's estate should be protected until he reached the age of maturity¹.

In Gopee Churun Burral v. Mussummat Ishwuree Lukhee Dibia² it was held that where money was borrowed to discharge bona fide arrears of government revenue by a person erroneously registered as proprietor of an estate, the rightful proprietor on coming into possession was liable for the debt. Opinion of the pundits was sought in this case, and they were of the opinion that under Hindu law the rightful owner of an estate was liable for the payment of debts incurred to discharge government revenue, though an unauthorised person had contracted them to protect the estate from sequestration. Relying on this decision their Lordships in Hunoomanpersaud's case upheld the view that a person unauthorised but in the management of the minor's estate could incur debts and the real proprietor would be bound by them if they were incurred for the benefit or protection of the estate.

From the sastric texts and the earlier relevant cases mentioned in Macnaghten's Principles and Precedents of Hindoo law³ and the one just referred to above it can

1 Manu VIII. 27.

2 (1821) 3 Sel. Rep. SDA 124 (NE).

3 Vol. 2 (1828 ed.).

be deduced that a person not having full powers of disposition and not being fully authorised could in certain circumstances transfer property and confer an absolute and indefensible title on the purchaser though he himself did not possess that title. Wherever money had been taken or an act had been done which had benefited the real owner of an estate, that loan or act could not be repudiated merely on the technical ground of want of authority in the person taking the loan or doing the act. The principle was that if the estate of a person, whether a minor or absentee or a joint proprietor, had been benefited by the act of a person who did not hold proper authority but who was in the management of the estate, then that act should be respected by the true owner and not repudiated merely on the ground of want of authority. Indeed, it was the necessity and not the authority of the alienor that used to decide the validity of an alienation. De facto guardianship is not therefore a concept foreign to sastric Hindu law, but the visualisation by the Anglo-Hindu law of a de facto guardian's authority to pay the ancestral debts of a minor is undoubtedly something foreign to it. Mahajan, J., in Sriramulu's case¹ observed:

"The decision in Hunoomanpersaud's case is in accord with the spirit of Hindu jurisprudence qua payment of debts incurred in certain emergent situations or in regard to alienations of immovable property effected in similar circumstances".

1 AIR 1949 FC 218, 250.

The observation of the learned judge of the Federal Court would have been a right step towards the revival of sastric Hindu law if by the words 'payment of debts incurred in certain emergent situations' he meant only the personal debts which include debts for the necessity of the minor and his family, and debts for the benefit of his estate, and not his ancestral debts; and we could consider the Privy Council decision overruled to the extent that it had included in it the authority to transfer a minor's property by a guardian for the minor's ancestral debts. It is doubtful whether the learned judge meant what the language of the above quotation implies, because throughout his judgment he did not refer to the important difference between the liability for the payment of personal debts and that of ancestral debts of a minor. If the decision in Hunoomanpersaud's case was implied to be in accord with the spirit of Hindu jurisprudence, then the observation is not fully true, since, we have seen above, the Privy Council decision accommodated extraneous principles in Hindu jurisprudence.

1.3. Derrett on Hunoomanpersaud's case

Derrett has challenged everyone to find the sources of the dual proposition propounded by Knight Bruce, L.J., in Hunoomanpersaud's case, viz., that (i) the manager's power to charge the minor's estate 'in case of need, or for the benefit of the estate', and (ii) a power analogous

to that of a prudent owner in order to benefit the estate are both capable of exercise in relation to a minor, needless to say without the court's consent and irrespective of the actual cause of the transaction, the last so far as the lender is concerned . At his Critique¹ he suggests that no source for this rule can be found, and though, at page 427 f.n. 4, he suggests that Macnaghten's Hindu law must have been before the Privy Council, he insists that Macnaghten himself did not believe that a minor's property could be sold or mortgaged to pay debts, and cites several vyavasthas of pundits which certainly appear to negative any such powers by a widowed mother.

However, there are certain other authorities not cited by Derrett, the significance of which requires to be assessed before we can conclude that his ultimate conjecture of the negotiorum gestio is right, attractive as it might seem at first sight. In Doe dem Bissonaut Dutt v. Doorga Persaud Dey,² we find that at that very early date pundits both of the Supreme Court of Calcutta and of the 'Mofussil Court of Appeal', that is the Sadar Dewani Adalat, agreed that 'a Hindu widow, having infant sons, could sell the property of those sons to a stranger to preserve the "child" from want', and 'she can, in cases of emergency sell without the consent of her husband's relations, viz.,

1 Derrett, Critique, 427-28.

2 (1815) 2 Morley's Digest, 49 case 34; 1 Hyde East, 50.

for the subsistence of a child, the portion of a daughter, and a sraddha; whereas, if she have means of support from the family she has no power of sale'. The pundits alleged as their sources the Daya-tattva, the Dayabhaga, and the Vivada-chintamani.

Further Derrett has not adverted to Macnaghten's Hindu law Vol. 2, 293 case 2, where pundits replied that a widow might sell her husband's estate to maintain her minor son and grandson, and pay arrears of revenue to government, conformably to the Dayabhaga and other authorities. Further in Macnaghten's same work page 289 case 13, from Zilla Burdwan, dated 4th December 1817, we have the opinion that 'any bond which a mother, having contracted a debt for the maintenance of her minor son, may have executed in the name of such minor son in favour of the creditor, is binding according to the text of Brihaspati and others cited in the Vivada-ratnakara, the Vivada-chintamani, the Daya-tattva, and other authorities. Now from the translation there given of two texts upon which they rely the mystery is solved.

The mystery may well be solved, but the confusion takes a moment to dispell. The pundits, faced with the fact that government would sell an estate for arrears of revenue, and the inconvenience of having a different personal law in the case of Hindus from those of other communities, chose to view the question from the angle,

not of the power of alienation of the property of a minor, an aspect of guardianship, but rather from the angle of the powers of de facto managers of a Hindu family, exactly as Knight Bruce, L.J., says.

The solution was hinted at by Derrett at page 427, last two lines. The topic has been masked from students of the history of Indian law because of the persistent (but he claims wrong) doctrine that there cannot be any manager of a joint family amongst Hindus, whether of the Mitakshara or the Dayabhaga School, who is not an adult undisqualified male. At 68 Bom. L.R., Journal, 3-6 (1966) he thoroughly discusses a row of texts, which are in fact exactly those to which our pundits applied their minds. It emerges from them that widows, as well as wives, can very well be managers of joint families in case of necessity, indeed for exactly the purposes set out by the pundits in 1815 in Doe dem Bissonaut Dutt's case, purposes which are at once recognisable as those authorising a 'single coparcener' to alienate without a court's order or the consent of his co-owners under the Mitakshara. In cases of necessity, such as payment of government revenue, and the maintenance of the persons who could not be expected to find their own necessities (minor children and marriageable girls in particular), the de facto manager, even a slave, as we have already seen, had powers under the sastra and the earliest Anglo-Hindu law to bind the estate. This estate would be the joint estate, or the undivided ancestral estate of

several co-minors and the pundits saw no reason whatever why this should not apply to a single minor heir. This was pundit-legislation.

An echo of this certainly reached the Privy Council. Contrary to Derrett's surmise, every authority cited to their Lordships is listed at page 407 of the original Moore's Indian Appeals report, and in that list neither the case of 1815 nor any material from Macnaghten, nor Macnaghten himself, figures. On the other hand their Lordships' Committee contained the Rt. Hon. Sir Edward Ryan, who was Chief Justice of Bengal more than twenty years earlier. He will have been familiar with the consonant decisions of the Sadar Diwani Adalat and the Supreme Court in this particular. The Advice drafted by Knight Bruce, L.J., which, as Derrett says, gives no authorities at this point, betrays precisely the informal 'briefing' which their Lordships received. The authorities quoted at page 407 of the report will be found to support everything said above on the powers of a manager.

What emerges from all this is simple. If the property is viewed as an ancestral and potentially family estate governed by Mitakshara law the de facto manager has powers of alienation to pay debts, and to meet the minor's necessities. This is because of a pundit's extension of the texts relating to powers of the manager in emergencies. But this by no means takes us all the way home. Those texts,

which are arranged in such a way as to prevent disputes arising about alienations entered into in emergencies, do not relate to acts voluntarily undertaken for the minors' benefit, Anything for the personal benefit of a minor, which is not obviously classifiable as 'benefit of the family' (Skt. Kutumbartha), is outside powers envisaged in that text, and therefore outside the pundits' opinion. They have carefully envisaged kutumbartha as 'benefit', i.e., pressing necessity, 'of the family', as Knight Bruce, L.J., more or less says. What they do not admit is that acts may be undertaken voluntarily for the benefit of the minor of a positive character, and irrespective of emergencies. This is a quite special, and not at all authoritative, interpretation of the 'manager-emergency' texts (set out by Derrett), and it is at this point that Hindu law seems to have been enriched by the negotiorum gestio concept, obtained, as Derrett suggests, whether from India itself or from the practice of courts in England relative to an administrator durante minori aetate.

1.4. Attempts of some courts to limit the application of the decision in Hunoomanpersaud's case

In a few cases some learned judges questioned the construction of Hunoomanpersaud's case and observed that the rule laid down in that Privy Council case should be limited to cases of natural guardians or to persons who have some kind of authority whether as joint owners,

trustees or otherwise over the property itself but it did not apply to cases of relations or friends who assume management of a minor's estate in the absence of natural guardians and who had themselves no interests in the property. In other words, the decision could be said to have application to cases where a person having some interests in the property entered into management of the whole of the estate and effected alienation, but it could not be said to have laid down that a person who without any title entered into management of the minor's estate could charge it either for necessity or for the benefit of the estate itself with debts. In Limbaji Ravji v. Rahi Ravji¹ it was held by Macleod, C.J., and Crump, J., that a Hindu step-mother who was acting as de facto manager of a minor had no power to effect a mortgage or sale of the ward's property. This decision was commented upon in Harilal Ranchhod v. Gordhan Keshav² where the learned judges found that the separated uncle who acted in that case as guardian had never been a de facto manager of the minor's estate and never assumed management of the property in the real sense of the term, and therefore Marten, C.J., who gave the leading judgment did not feel the necessity for referring to a Full Bench the decision in Limbaji's case for its correctness³. But eventually the said decision was

1 AIR 1925 Bom 499.

2 (1927) 51 Bom 1040.

3 Ibid, 1045.

referred to a Full Bench in Tulsidas v. Raisingji¹ by Baker, J. The question referred to the Full Bench was whether under Hindu law a de facto guardian of a minor could validly sell the property of the minor to a third person for legal necessity. Beaumont, C.J., who was one of the members of the Full Bench² took the view that the decision in Limbaji's case was correct and that a de facto guardian of a minor under Hindu law could not validly sell the property of the minor to a third person even for legal necessity. The learned Chief Justice observed that in the Hindu law texts there was nothing on the subject which was really relevant; the Privy Council decision had no authority in so far as it dealt with Hindu law. He further observed³:

"The High Courts of Calcutta and Madras have both come to the conclusion that a de facto guardian of a minor has the power claimed, and in so doing they considered that they were following the decision of the Privy Council. This High Court has come to a different conclusion ... In my opinion, we are not justified in overruling the decision of our own court unless we are satisfied that it was wrong in principle, or was opposed to authority which was binding on this court".

The learned Chief Justice apprehended that if a person claimed the right to sell the property of another, he must establish his title so to do. It must be remembered that Sir John Beaumont was an English Chancery K.C. who came out to Bombay to become Chief Justice there. Although

1 AIR 1933 Bom 15 (FB).

2 The Full Bench consisted of Beaumont, C.J., and Patkar and Barlee, JJ.

3 AIR 1933 Bom 15, 17 (FB).

in many cases the right to deal with the property of another might arise from the legal relationship between the parties, he felt it strange to suggest that such a power could be acquired by such relationship as exists between a de facto guardian and the ward, which has no legal sanction! For his observation the learned Chief Justice relied on the following remarks of Kumaraswami Sastri, J., in Ramaswamy v. Kasinatha¹:

"Were the matter res integra I would be disposed to hold that the observations of Lord Robson [in the Privy Council] above quoted, would be applicable equally to cases where the parties are Hindus as there is nothing peculiar to the Hindu system of jurisprudence which confers on a person who without authority assumes the office of guardianship any special powers".

The observations of Lord Robson to which reference is made in the above quotation are the following²:

"It is urged on behalf of the appellant that the elder brothers were de facto guardians of the respondent and as such were entitled to sell his property, provided that the sale was in order to pay his debts and was therefore necessary in his interest. It is difficult to see how the situation of an unauthorised guardian is bettered by describing him as a 'de facto' guardian. He may by his de facto guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it".

But of course that Privy Council case had been between Muslims! The learned Chief Justice disagreed with the reasoning of the appellant's counsel that in "Hindu law the touchstone is necessity, and that once it is established that it is necessary in the interest of an infant that his

¹ AIR 1928 Mad 226.

² Mata Din v. Ahmad Ali (1912) 16 CWN 338, 345; 39 IA 49, 55.

property should be sold, then anybody who is in fact managing the property is authorised to sell it". He maintained the difference between the position of the manager of a joint Hindu family and that of the guardian of a minor. He observed that where there was no natural guardian available the court could appoint any person to be guardian of a minor, and that if the de facto guardian in that case had been appointed to act by the court she would have had no power to make the sale in question without an order of the court under section 29 of the GWA, and that it would be illogical that a 'power should be annexed to an office held without authority which would not be so annexed if the office were held under legal sanction!

In the same case Patkar, J., agreed with the observations of the Chief Justice to the extent that there was no clear Hindu law text to enable the de facto guardian to alienate property. He observed¹:

"The texts which have been referred to in the argument before us ... are Mitakshara, Ch. 1, sec. 1, verses 27, 28 and 29, and Colebrooke's Digest of Hindu law, Vol. 1, pp. 203 and 204. The texts in the Mitakshara have been construed by Banerjee, J., in Mohanund Mondul v. Nafur Mondul [(1899) 26 Cal 820], as authorising alienation by a de facto manager of the property of the minor. The texts in Colebrooke's Digest were relied on by Nanabhai Haridas, J., in Bai Amrit v. Bai Manik [(1875) 12 Bom HC Rep 79], as supporting alienation by the de facto manager. There is nothing explicit in those texts which invest a de facto guardian of a minor with the power to alienate the minor's property".

The learned judge admitted that he was impressed by the view taken by Lord Robson cited above but he did not

1 Tulsidas v. Raisingji AIR 1933 Bom 15, 18 (FB).

like to apply the principles contained in the decisions in Mata Din v. Ahmad Ali¹ and Imambandi v. Mutsaddi² to a Hindu case since those decisions of the Privy Council 'deal with Mahomedan law and are based on explicit and clear texts of Mahomedan law'. He followed the decision in Hunoomanpersaud's case and observed³:

"I have not to consider what the law on this point should be, but I am bound to ascertain the Hindu law as laid down by the decisions of the Privy Council. I think that the decision of the Privy Council in Hunoomanpersaud's case has been considered consistently ever since that decision as supporting an alienation by a de facto guardian in case of necessity".

The Full Bench, however, by a majority on the rule of stare decisis held that de facto guardian had power to alienate a minor's property in case of justifying necessity and they overruled the decision in Limbaji's case.

The decision in Hunoomanpersaud's case was questioned to a certain extent in the Madras High Court in Seetharamamma v. Appiah⁴ by Odgers, J., when he observed:

"It has been argued at length for the respondents that a de facto guardian is unrecognized in the Hindu law. It may be at once said that, if there is such a recognition I am satisfied that the recognition is more or less modern and possibly to some extent, the recognition, if it is legally recognized at all, has come about by necessity".

Viswanatha Sastri, J., another judge of the Bench in the above case held that the right of a de facto guardian to deal with the property of a Hindu minor had been

1 (1912) 16 CWN 338 (PC).

2 (1918) 25 CWN 50 (PC).

3 AIR 1933 Bom 15, 20 (FB).

4 AIR 1926 Mad 457.

recognised by the courts ever since the decision of the Privy Council in Hunoomanpersaud's case, provided the alienation was for necessity.

Hallifax, A.J.C., of the Nagpur Judicial Commissioner's Court was also critical about the rule in Hunoomanpersaud's case. He observed obiter in Keshho v. Jagannath¹:

"The structure of Hindu society, with its joint family system certainly does differ from that of any other society in the world but that does not give any person the right to take charge of the property of any minor he may come across, just because he happens to be a Hindu, whether they are nearly or distantly related or not related at all, and 'thereby clothe himself with power to sell it'. ... The fundamental mistake made in respect of Hunoomanpersaud Panday's case is in assuming that it defines the powers of a guardian of a Hindu minor. It deals throughout with the powers of a manager, and the word 'guardian' occurs in their Lordships' judgment only four times, twice in quotations from the judgment of the Sadar Diwani Adalat, once in a quotation from the plaint and once in their Lordships' summing up of their conclusions. In the last place the word may have been used because it had been used all through the case in the courts in India, or, if I may suggest it without disrespect, by a slip".

In Ram Nath v. Sant Ram² Beckett, J., thought himself to have been in an awkward situation to apply the rule in Hunoomanpersaud's case to a case where a de facto guardian had transferred a reversionary interest of a minor and the act was a prudent one in the minor's interests. The learned judge could not put faith in the Privy Council rule and himself vainly searched in Colebrooke's translation of Jagannatha's Digest, and the Mitakshara to find support for

¹ AIR 1926 Nag 81, 83 (FB).

² AIR 1935 Lah 820.

the transaction, and said that though the powers of a de facto guardian under Hindu law were wider than under other systems, and though he had the same powers as a de jure guardian to dispose of a portion of the ancestral estate in order to avert a threatened calamity, but he had no power to dispose of a reversionary interest of a minor even though it seemed to have been a prudent step at the time when it was undertaken. It was observed¹:

"I do not think that the powers of a de facto guardian should be extended in the absence of express authority, and I do not think they should be taken as including the power to dispose of a reversionary interest, though this may seem to be a prudent step at the time when it is taken".

Unwittingly the learned judge went to limit the power of a de facto guardian which was already a limited one. He could have come to the same decision by distinguishing the facts in this way that the de facto guardian was not in the management of the reversionary interest of the minor and therefore he had no power to dispose of it². It is the necessity of the act and not the authority of the person doing it that is to be scrutinised.

In Nrishingha v. Ashutosh³ a Division Bench of the Patna High Court observed that the decision in Hunoomanpersaud's case applied where a person in the management of an estate had himself an interest in the property alienated and that the Privy Council case was no authority for the view that

1 AIR 1935 Lah 820-21.

2 Krisnamurthi v. Krishnamurthi AIR 1927 PC 139.

3 AIR 1938 Pat 487.

a de facto manager was something more than an intermeddler to alienate the property of a minor. Manohar Lall, J., made the following observation¹ when the appellant's counsel relying on the majority decision in Tulsidas's case contended that there was something peculiar to the Hindu system of jurisprudence which conferred special power on a person who without authority assumed the office of guardianship:

"The decision of the Full Bench was a dissenting decision where the learned Chief Justice took a contrary view. The other learned judges have made observations which appear to be in support of the contention of the appellant. The learned judges were impressed by the observations of the Privy Council in the well-known case of 6 MIA 393 [Hunoomanpersaud's case]. ... If that case be carefully examined, it will be found that the charge was created by a person who was de facto in possession with an apparent title either in himself or as the manager of another and in that capacity had created a charge on the estate. ... I take the decision of the Privy Council to mean no more than what it says, namely that the alienation validly made by the manager in actual possession of the estate is valid".

The learned judge further observed that if the argument of the appellant's counsel was accepted, the GWA would be considered to be abrogated. He held that an unauthorised guardian by reason of his being a de facto guardian could assume important responsibilities in relation to the minor's property, and could thereby be responsible for any damage that might be occasioned by his wilfully meddling with the affairs of the minor's property; but by so doing he could not clothe himself with any legal power to dispose of the

1 AIR 1938 Pat 487, 495.

minor's property and could not by arrogating to himself the responsibilities of a de facto guardian be allowed legally to deal with or transfer the properties of the minor. According to the learned judge such a transaction was wholly unauthorised and the question of any benefit to the minor did not arise at all. He further mentioned that an honest money-lender or a person who honestly took transfer of a minor's property had to be careful to see that the person who was making the transfer in question was either a legal or natural guardian or a guardian appointed by the court or was a person who was actually managing the estate for the minor in which he had also an interest.

1.5. De facto guardianship in Anglo-Hindu law: a product of Hunoomanpersaud's case

No doubt there may be some substance in the views expressed by the learned judges in the above cases, but the number of those cases is very few. In a large number of cases in all the High Courts of India the decision in Hunoomanpersaud's case has been accepted as laying down the rule that a de facto guardian of a Hindu minor can alienate his estate in cases of necessity or for the benefit of his estate. As long back as in 1868 the Calcutta High Court began to follow Hunoomanpersaud's case in matters of de facto guardianship. In its earliest reported case of Gunja Pershad v. Phool Singh¹ Macpherson, J., sitting along

1 (1868) 10 WR 106 (CR).

with Bayley, J., applied the rule of Hunoomanpersaud's case to an alienation effected by a brother as de facto guardian of his minor brothers, and held that such an alienation by a de facto guardian would be good if made under pressing necessity. In Mohanund Mondul v. Nafur Mondul¹ where the grandmother sold the property of a minor Maclean, C.J., and Banerjee, J., held that a de facto guardian could alienate the minor's property as de facto manager of the property, and that the minor would be bound by such alienation, no matter whether it was by sale or mortgage. In Adhar Chandra v. Kirtibash Bairagee² it was held that the powers of a de facto guardian were the same as those of a natural guardian, and that a de facto guardian could alienate a minor's property. It was observed in that case that such a view was conceded by such an eminent counsel as Dr. Rash Behari Ghosh. Mookerjee and Newbould, JJ., in Krishna Chandra Choudhury v. Ratan Ram Pal³ held that a de facto guardian and manager of the property of a minor could effect a valid conveyance of his property and create a valid charge on it if it was one that a prudent owner would make for the benefit of the estate. The learned judges remarked⁴:

"This view has been adopted and applied by the Indian courts ever since the decision of the Judicial Committee was pronounced on the 26th July 1856. In the decision of a Full Bench of

1 (1899) 26 Cal 820.

2 (1910) 12 CLJ 586. The relevant portion of this case was also quoted in Seetharamamma v. Appiah AIR 1926 Mad 457, 458.

3 AIR 1916 Cal 840; (1915) 20 CWN 645.

4 Ibid, 20 CWN 647.

the Sudder court in the case of Gooroopersaud Jena v. Muddun Mohun Soor [(1856) SDA 980 (Beng)] where the judgment was pronounced on the 11th December 1856, apparently before the decision of the Judicial Committee reached this country, the same view was independently taken, and it was held that the benefit of the minor creating necessity was a test by which the legality of the transaction must be tried: the rule is that a party filling a fiduciary character like that of a guardian, is authorised to perform any act which is manifestly for the infant's benefit".

The Bombay High Court started to ascertain the power of a de facto guardian in the light of the sastric texts. In Bai Amrit v. Bai Manik¹ where the mother, being the only adult member of the family and in the management of the family property, as such alienated certain family property for the benefit of the estate, Nanabhai Haridas, J., relying on Colebrooke's translation of Jagannatha's Digest Vol. 1 verses 191 to 193 observed²:

"She (mother) was, moreover, by Hindu law, the guardian of her late minor son and of her minor daughter-in-law, ... and competent in that capacity to deal with the family property for the benefit of the estate. ... But seeing that she was manager de facto of the family, her sales in that character of portions of the family property for valuable consideration, which, when obtained by her, was actually applied to meeting family necessities, cannot ... be questioned. The Hindu law enables even a slave, a fortiori, therefore, a person ... to bind the family by contracts".

This view now stands affirmed by the majority decision of the Full Bench in Tulsidas v. Raisingji³. Patkar, J., with whom Barlee, J., agreed said in his judgment that his duty was to ascertain the Hindu law as laid down by the

1 (1875) 12 Bom HC Rep 79.

2 Ibid, 81. Reference was also made by the learned judge to Bai Kesar v. Bai Ganga (1871) 8 Bom HC Rep 31 (ACJ) where he acted as the counsel for the appellant.

3 AIR 1933 Bom 15, 21 (FB).

ancient texts and in the absence of texts as laid down by the decisions of the Privy Council. The learned judge observed that there was nothing explicit in the verses 27 to 29 of the Mitakshara and Jagannatha's Digest Vol. 1 which would invest a de facto guardian with the power to alienate a minor's property, but ever since the decision in Hunoomanpersaud's case had been taken it was considered consistently as supporting an alienation by a de facto guardian in case of necessity.

The Madras High Court followed the Privy Council decision. In Arunachela Reddi v. Chidambara Reddi¹ White, C.J., and Benson, J., held an alienation of a minor's property by his mother acting as de facto guardian as valid on the ground of necessity. In Seetharamamma v. Appiah² Viswanatha Sastri, J., said:

"I am clearly of opinion that the right of a de facto guardian to deal with the property of a Hindu minor has been recognised by our courts ever since the decision of the Privy Council in Hunoomanpersaud Pandey v. Mt. Babooee Munraj [(1856) 6 MIA 393] provided the alienation was for necessity".

The Lahore High Court adopted a similar view. In Kundan Lal v. Beni Pershad³ Tek Chand, J., in delivering the judgment of a Division Bench relied on the Full Bench decision in Mastu v. Nand Lal⁴ where the decision in Hunoomanpersaud's case was followed, and held that an

1 (1903) 13 MLJ 223.

2 AIR 1926 Mad 457, 461.

3 (1932) 13 Lah 399.

4 (1890) 25 PR 200 (FB).

alienation by the de facto guardian of a Hindu minor for the benefit of the minor's estate and with regard to the minor's interest could not be impeached by the minor on attaining majority on the mere ground that the guardian was not a legal guardian under Hindu law.

The Allahabad High Court in its earlier cases went even to extend the Privy Council rule to Muslim cases and hold that a de facto guardian in that system too had power to make alienations. This view was set aside in Mata Din v. Ahmad Ali¹. In Nokhelal v. Rajeshwari Kumari² the Patna High Court followed the Full Bench decision of the Bombay High Court in Tulsidas's case, although in Nrisingha v. Ashutosh³ Manohar Lall, J., construed this decision differently. The decision in Hunoomanpersaud's case was followed by the Nagpur High Court like the above High Courts. Particular mention may be made of the Full Bench decision in Kesho v. Jagannath⁴ where Hallifax, A.J.C., following the decision in Hunoomanpersaud's case said that that decision had been consistently followed as a correct exposition of Hindu law in a series of several High Courts.

In Sriramulu v. Pundarikakshayya⁵ all the learned judges of the Federal Court of India admitted the decision in Hunoomanpersaud's case as the source of the power of a

¹ (1912) 16 CWN 338 (PC).

² AIR 1937 Pat 141.

³ AIR 1938 Pat 487.

⁴ AIR 1926 Nag 81 (FB).

⁵ AIR 1949 FC 218.

de facto guardian. Kania, C.J., said¹:

"The few Hindu law texts which deal with the disposal of a minor's property by some one else in case of necessity are collected in Colebrooke's Digest Vol. 1, page 302. As regards authoritative judicial decisions, the first was given in 1856 Hunoomanpersaud Pandey v. Mt. Babooee Munraj Koonweree [(1856) 6 MIA 393]".

Fazl Ali, J., said²:

"It may now be taken to be well settled by a long course of decisions that a de facto guardian has, in case of necessity or benefit to the minor, power to charge, mortgage or sell the minor's property. The earliest case which supports this view is the well known case of Hunoomanpersaud Pandey v. Mt. Babooee [6 MIA 393], on which a large number of subsequent decisions are based".

Mukherjea, J., said³:

"There is quite a number of cases decided by the different High Courts in India, where it has been held on the authority of the decision in Hunoomanpersaud Pandey's case that the powers of alienation for necessity or benefit of the infant can be exercised by a de facto guardian as well; and so far as these powers are concerned, there is no distinction in Hindu law between a de jure and a de facto guardian".

Mahajan, J., said⁴:

"The decision in the case (i.e., Hunoomanpersaud's case) was given in the year 1856 and has since then been discussed and commented upon in a very large number of cases in the High Courts in India. It has been construed as laying down the proposition that a de facto manager of a Hindu minor's estate can by incurring debts charge his estate and can also dispose it of partially or wholly, provided the necessities of the minor require it. ... it can be said without hesitation that in numerous cases alienations in the nature of mortgages or sales have been upheld on the basis of the above rule".

1 AIR 1949 FC 218, 219.

2 Ibid, 223.

3 Ibid, 232.

4 Ibid, 243.

2. Alienations by de facto guardians

Under Hindu law a de facto guardian has the same power of alienating the property of a minor as that of a natural or de jure guardian¹. He may for legal necessity or for the benefit of the estate of the minor sell, mortgage or lease out his property. Conversely, when a de facto guardian or manager is in possession of a minor's estate he will be bound to account to the minor for his management as it is open to the minor on attaining majority to elect to sue him either for damages or for an account². There seems virtually no difference between the powers of alienation of a de facto and a de jure guardian except that an improper alienation made by either of them may be either void or voidable. This will be discussed in chapter V.

In Sriramulu v. Pundarikakshayya³ where the basic question involved was relating to the right of a de facto guardian under Hindu law in respect of alienating the properties of a minor and of creating contractual liabilities enforceable against the minor's estate the learned judges of the Federal Court, specially Mahajan, J., discussed in details the powers of a de facto as well as a de jure guardian with references to all probable sastric texts,

1 Sriramulu v. Pundarikakshayya AIR 1949 FC 218, 232;
Annapurnamma v. Ramanjaneyaratnam AIR 1959 AP 40, 48.

2 Ramanathan Chettiar v. Raja Sir Annamalai Chettiar (1934) 57 Mad 1031, 1051-52 following Dormer v. Fortescue (1744) 3 Atk 124; 26 ER 875; Hicks v. Sallit (1854) 3 De. G.M & G 780; 43 ER 304; Howard v. Earl of Shrewsbury (1874) 17 Eq.Cas 378; Sankaralingam Chetty v. Kuppuswami AIR 1935 Mad 305 relying on Suriaprakasam v. Murugesam (1925) 47 Mad 774 (FB) wherein reference was made to Morgan v. Morgan (1737) 1 Atk 489; 26 ER 310; Pulteney v. Warren (1801) 6 Ves 73; 31 ER 944; Doe v. Keen (1797) 7 T.R 386; 101 ER 1034.

3 AIR 1949 FC 218.

Anglo-Hindu text-books and a large number of cases of the Privy Council and different High Courts of India. The facts of the case show that the natural father of an adopted son executed as de facto guardian a promissory note in renewal of some earlier Promissory notes executed by the adoptive father and mother, and executed a sale deed in discharge of debts due under the above renewed promissory note. It is seen earlier that all the learned judges of the Federal Court unanimously accepted the rule of Hunoomanpersaud's case and admitted that a de facto guardian similar to a de jure guardian had power to alienate a minor's property for the twin purposes of Hunoomanpersaud's case. In case of necessity or for the benefit to the minor's estate a de facto guardian has power to sell or mortgage the property of the minor¹, but he cannot alienate it for purposes which are not lawful². An alienation by a de facto guardian supported by legal necessity cannot be impeached on the ground that it was made by a person who was merely a de facto guardian³. Sometimes even during the existence of a de jure guardian a de facto guardian can alienate a minor's property for the latter's necessity and benefit, and he would be bound by such transaction if the whereabouts of the de jure guardian are not known⁴. Alienations executed by a de facto guardian can be challenged by the minor as not made for his benefit,

1 Sheo Gobind v. Ram Adhin AIR 1933 Oudh 31, 32; Bettegowda v. Dyavarasegowda AIR 1953 Mys 130; Palani Goundan v. Vanjiakkal AIR 1956 Mad 476, 478; Narayan Prasad v. Sukumari Dei (1964) Cut 298, 303.

2 Tattya Mohyaji v. Rabha Dadaji AIR 1953 Bom 273; Rambhau v. Rajaram AIR 1956 Bom 250.

3 Panchu v. Hrishikesh AIR 1960 Cal 446, 448.

4 Palani Goundar v. Sellappan (1965) 1 MLJ 435.

but third persons have no locus standi to challenge it on that ground¹.

The alienation must be proportionate to the necessity of the minor or the benefit of his estate, otherwise the de facto guardian will have to account for it². In Ramaswamy Pillai v. Kasinatha Iyer³ Kumaraswami Sastri, J., sitting with Curgenvin, J., observed that where a court found that an alienation by a de facto guardian was not wholly binding on minors, there were three courses open as regards granting relief. The first course was to set aside the sale altogether and direct the minors to pay the vendee the consideration which was binding on them with interest, if any; the second course was to direct the purchaser to pay the minors the difference between the actual value of the land and the consideration which was binding on them with interest; and the third course was to divide the lands in proportion to the value of the lands and the actual consideration found payable. In Bettegowda v. Dyavarasegowda⁴ where the maternal uncle under whose care the minor came after the death of his parents sold the minor's property for the benefit of the minor, Mallappa, J., sitting alone found the sale as most advantageous and wisely made, and held that alienations should be upheld in full where the necessity for them was established in respect of a very substantial portion

1 Tapassi Ram v. Raja Ram AIR 1930 Lah 136, 137.

2 Morgan v. Morgan (1737) 1 Atk 489; 26 ER 310. In this case Lord Hardwicke, L.C., observed; "Where any person whether father or a stranger, enters upon an infant's estate and continues the possession, this court considers him as a guardian, and will decree an account, and to be carried on after the infancy is determined, unless the infant after being of age waived such account".

3 AIR 1928 Mad 226.

4 AIR 1953 Mys 130.

of the consideration. Since it is hard to lay down any general rule as to what course courts would adopt in a case, and since each case depends upon the particular circumstances of that case, it may not be always judicious to uphold an alienation in full on the ground that the legal necessity for a substantial portion of the consideration has been proved. It is not the amount of consideration, it is the welfare of the minor that should be considered. Subba Rao, C.J., observed in Suryaprakasam v. Gangaraju¹ that in all transactions affecting a minor a paramount duty rested upon a court not to put its seal on transactions affecting his interests. Moreover, as we have seen in the previous chapter, the right of the purchaser of a minor's property from a guardian is only a right of the guardian to be indemnified against the minor's property which can be exercised only when there was necessity for the transaction. Where the amount of the property sold is in excess of the minor's necessity the purchaser may well be treated as a trustee. In Soar v. Aswell² Lord Esher, M.R., said:

"Where a person has assumed, either with or without consent, to act as a trustee of money or other property, i.e., to act in a fiduciary relation with regard to it, and has in consequence been in possession of or has exercised command or control over such money or property, a Court of Equity will impose upon him all the liabilities of an express trustee, and will class him with and will call him an express trustee of an express trust".

If the welfare of a minor demands the return of the remainder of necessity, the court must impeach the transaction

1 AIR 1956 AP 33, 45 (FB).

2 (1893) 2 QB 390, 394 (CA). This case was referred to in Ramendra Nath Roy v. Brojendra Nath Dass (1917) 45 Cal 111, 136, and Ramanathan Chettiar v. Raja Sir Annamalai Chettiar (1934) 57 Mad 1031, 1051-52.

to that extent. Where, however, the remainder has been invested for the benefit of the minor, the minor cannot attack the sale on the ground that it is devoid of necessity¹.

De facto guardianship has no application amongst the Nairs of Travancore-Cochin, who follow not the Mitakshara but the Marumakkattayam system. A Division Bench of the Travancore-Cochin High Court observed in Raman Pillai v. Kesavan Nair² that under the Hindu system of jurisprudence it was a special rule that a person in actual management of the affairs of a minor could charge the minor's property for the latter's necessities, and that it could not by analogy be extended to the Nairs amongst whom a self-appointed guardian or manager had no legal authority to deal with a minor's property.

2.1. Contract for debts by a de facto guardian

2.1.1. On simple bonds

It is seen in the previous chapter that the Federal Court held in Sriramulu's case that a guardian whether de jure or de facto could not enter into a contract bringing about a direct contractual relationship between the creditor and the minor or the minor's estate. The creditor could, however, under certain circumstances relying on the principle of subrogation enforce the rights of a guardian against the minor's estate. Kania, C.J., observed³ that when a loan

¹ Subbakal v. Subba Gounder AIR 1965 Mad 371, 372.

² AIR 1955 (NUC) 2202 (Trav-Co).

³ AIR 1949 FC 218, 222.

was taken for the purpose of necessity or benefit of the minor's estate by a de facto manager he could not effect a transaction so as to exclude his own liability. The learned Chief Justice suggested that so far as the creditor was concerned this involved no hardship because he could proceed against the de facto manager and make the minor's estate liable on the principle of surrogation; and this would not hurt the honest de facto manager because he had got the necessary facts and materials to show that the transaction was for the necessity of the minor or for the benefit of his estate; nor would it adversely affect the minor's interests because when a claim was made and the facts showed that the transaction was for necessity or benefit of his estate, the minor would have no claim against the de facto manager for maladministration and his estate should meet the obligation. In this way a de facto manager could borrow money for the necessity or benefit of the estate, and make the minor's estate liable for the loan without making out a contract between the minor and the creditor. Mukherjea, J., observed¹ that since a minor could not become a party to a contract there could be no direct contractual liability established against him or his estate. But as the de facto guardian was personally liable under the contract he could be entitled to reimbursement from the minor's estate under the rule of Hindu law if the loan was for necessity or benefit of the minor, and the creditor

1 AIR 1949 FC 218, 237.

could in such circumstances invoke the equitable principle of subrogation in his favour and claim to be placed in the position of the de facto guardian for enforcement of the latter's right of reimbursement against the minor's estate. Mahajan, J., said¹ that a de jure guardian could borrow money on simple contracts entered into on behalf of the minor provided they fell within the limits laid down in Hunoomanpersaud's case, and that when a de facto guardian was the de facto manager of the minor's estate, he enjoyed the same powers and the same status as a natural guardian except in cases where the statute law of the country intervened and laid down a different rule, and that similar to the case of a de jure guardian the touchstone of necessity was the guiding principle here too. The HMGA has now wholly abolished the powers of the de facto guardian to deal with the minor's immovable property, with the result that the creditor cannot reimburse himself even from the minor's estate².

2.1.2. On promissory note

We have seen in the earlier chapter that a natural guardian cannot execute a promissory note on behalf of a minor. In Nagindas v. Bhimrao³ a Division Bench of the Bombay High Court expressed the opinion that a promissory

1 AIR 1949 FC 218, 260.

2 Pradhan, Guardianship Acts, 115.

3 AIR 1943 Bom 44.

note executed by a de facto guardian on behalf of a minor even for necessary purposes could not bind the estate of the minor. In Vembu Aiyar v. Subbiah Pillai¹ Kuppaswami Ayyar, J., sitting alone held that a minor was not bound by an indorsement of payment made by his de facto guardian on a promissory note which the de facto guardian purported to execute in the minor's name. A Full Bench of the Madras High Court in Pundarikakshayya v. Sreeramulu² considered the question whether a person who without lawful authority took upon himself the management of the estate of a Hindu minor, could in law execute a promissory note in the name of the minor in respect of money borrowed for a necessary purpose and thereby bind the minor's estate. Leach, C.J., who delivered the judgment of the Full Bench held that a de facto guardian, as a person who without lawful authority took charge of a minor's estate was commonly known as such, of a minor could not in Hindu law execute a promissory note in the name of the minor in respect of money borrowed for a necessary purpose and thereby bind the minor's estate. This decision was relied on by a Division Bench of the same High Court in Bapayya v. Pundarikakshayya³. Both the Full Bench and the Division Bench cases went on appeal to the Federal Court where both the appeals were heard together and disposed of by one judgment by each of the four judges of the Federal Court. All the learned judges by a long

1 AIR 1943 Mad 273.

2 AIR 1946 Mad 1 (FB).

3 AIR 1946 Mad 198, 200.

persuasive discussion of numerous cases of different High Courts came to an uniform decision that a de facto guardian of a Hindu minor had no power to pass a promissory note in the name of the minor¹ so as to bind his estate without making himself liable and thus furnish consideration for a subsequent conveyance of the minor's property executed by the de facto guardian. Nor could such a promissory note be treated as an acknowledgment of a pre-existing debt in law because it was made by a person who was not authorised to give an acknowledgment under the Limitation Act (Act 9) of 1908.

2.2. Contract for lease

A de facto guardian has no authority to take a premises on lease on behalf of a minor². When a lease is taken it creates an obligation on the part of the minor to pay a stipulated premium or rent and a guardian cannot subject a minor to such an obligation. Ordinarily, in gift or other transfer in favour of a minor there is no reciprocal obligation cast on the minor, but in a lease reciprocal obligation is cast on the lessee³ to perform several obligations mentioned in section 108-B of the Transfer of Property Act (Act 4) of 1882. There is, however, nothing in the Transfer of Property Act according to which it can be said that a minor is disqualified to be a transferee⁴;

1 Derrett, Introduction, 87 para 113.

2 Jaykant v. Durgashanker AIR 1970 Guj 106.

3 Pramila Balidas v. Jogeshar AIR 1918 Pat 626.

4 Munni Kunwar v. Madan Gopal (1916) 38 All 62; Raghava Chariar v. Srinivasa (1917) 40 Mad 308 (FB) overruling Navakotti v. Logalinga (1910) 33 Mad 312.

he may be a purchaser¹ or a mortgagee². In English law a minor is disqualified to be a transferee of a legal estate in land but not of an equitable interest in land or other property³. A de facto guardian cannot start a new business on behalf of the minor. In Benares Bank Ltd. v. Hari Narain⁴ the Privy Council held that the manager of a joint Hindu family had no power to impose upon a minor member of the family the risk and liability of a new business started by him, and that it made no difference if the manager was the father of the minor. A fortiori a de facto or a de jure guardian has no power to start a new business on a minor's behalf, and impose thereby liability on him.

In Jaykant v. Durgashanker⁵ where a minor's de facto guardian took a premises on lease and started a new business there on behalf of the minor it was held that since a lease created an obligation on the part of the minor to pay a stipulated rent, and since there were reciprocal obligations cast on him under section 108-B of the Transfer of Property Act of 1882, the de facto guardian had no authority to create obligations to bind the minor's estate by acts which were not for necessity. And relying on the Privy Council decision in Benares Bank's case it was held that the de facto

1 Ulfat Rai v. Gauri Shanker (1911) 33 All 657; Munni v. Perumal (1915) 37 Mad 390; Narain Das v. Mst. Dhanja (1916) 38 All 154; Subba Reddy v. Gurava Reddy AIR 1930 Mad 425.

2 Madhab Koeri v. Baikuntha (1919) 52 IC 338; Thakar Das v. Mst. Pulti (1924) 5 Lah 317; Zafar Ahsan v. Zubaida Khatun AIR 1929 All 604.

3 Section 19, Law of Property Act (15 & 16 Geo. 5. c. 20) 1925.

4 AIR 1932 PC 182.

5 AIR 1970 Guj 106.

guardian could not take the premises on lease for the minor for a new business to be started. Moreover, section 107 of the Transfer of Property Act makes it clear that a lease to a minor must be void because it must be executed both by the lessor and the lessee. In Raghava Chariar v. Srinivasa¹ Srinivasa Ayyangar, J., drew a distinction between cases of contractual liability which a minor agreed to undertake and obligations attached to the holding of property, and said that in cases of pure gifts there was an obligation on the part of the donee to pay the government revenue and public taxes. In the case of a gift of a man's whole property there was the obligation to discharge the donor's debts to the extent of the value of the property. But these obligations did not prevent the vesting of the property in the minor by a transfer inter vivos, rather they were attached to the property and they were not really considerations for the transfer. But the learned judge singled out the obligations of a lease in the following words²:

"A transfer to a minor by way of a lease, he agreeing to pay rent or to perform any particular covenants which form an essential part of the transaction, may prevent the transfer from taking effect. In a sale, gift or mortgage ordinarily there are no such essential consensual obligations".

Therefore, both judicial decisions and statutory law are against a minor's becoming a lessee. R.S. Pandey³

1 (1917) 40 Mad 308 (FB).

2 Ibid, 335.

3 R.S. Pandey, 'Minor's agreements in India and the U.K. --- a comparative study' in (1972) JILI 205-252, 237.

asked why the de facto guardian of a minor could not execute leases for the minor which were not onerous and were for his benefit, and suggested the insertion of an exception clause to section 107 of the Transfer of Property Act by relaxing the general requirement of registration of instruments creating a lease. From the very nature of a lease it can never be totally free from being onerous, it would put the lessee in an obligation this way or that. No doubt Mr. Pandey's suggestion sounds nice, but why should a guardian take a lease on a minor's behalf however beneficial that might be? The fundamental duty of a guardian de jure as well as de facto is to maintain the property in status quo and not to augment it. Whether a transaction is within the ambit of a guardian's power should be considered first, and then it would be considered whether it is for the minor's benefit and not vice versa.

2.3. Contract for insurance by a de facto guardian

A de facto guardian can enter into an insurance contract on a minor's behalf for the protection of the latter's properties. In Great American Insurance Co Ltd. v. Madanlal¹ a policy of fire insurance was taken by the de facto guardian of a minor for certain cotton bales. The goods were burnt and the minor sued through his guardian as next friend. Beaumont, C.J., sitting with Rangnekar, J.,

1 (1935) 59 Bom 656.

said that since section 27 of the GWA enabled the guardian of a minor to deal with the minor's property as a man of ordinary prudence and empowered him for this purpose to do all reasonable and proper acts for the realisation, protection or benefit of the minor's property, the de facto guardian had authority to insure the minor's property against fire, and that since the minor was the person for whose benefit the contract was made, and out of whose estate the premium was paid, he would be entitled to sue on the contract. A similar view was taken in Vijaykumar v. New Zealand Insurance Co. Ltd.¹ where the adoptive mother, then on her death, the natural mother of an adopted minor son was looking after the business of the minor as the latter's guardian. This was also a suit to recover a loss on a contract of fire insurance for certain cotton bales destroyed by fire. The contract was entered into by the minor's de facto guardian, his natural mother, through her agents. When the counsel of the defendants relying on the Privy Council decision in Mohori Bibee's case² argued that the contract was a contract by the minor and that under section 11 of the Contract Act (Act 9) of 1872 such a contract was void, Desai, J., who was sitting alone observed³:

"The proposition laid down by their Lordships of the Privy Council being in general terms would have led to startling results if very strictly applied. For in that case, instead of guarding

1 AIR 1954 Bom 347.

2 (1903) 30 IA 114 (PC).

3 AIR 1954 Bom 347, 351.

the interest of minors over whom the law throws its aegis of protection, it would have done incalculable harm to their rights and caused much hardship. Pushed to a logical conclusion the Privy Council decision would have made it impossible for a minor to get benefit under or enforce any contract entered into by him even when the consideration had been wholly received by the other contracting party. But no such difficult position has arisen, since courts in India have, as a rule, in effect, confined the application of the Privy Council ruling only to cases where a minor is charged with obligations and the other contracting party seeks to enforce those obligations against the minor".

The learned judge followed Great American Insurance Co.'s case and held that a minor for whose benefit a contract of insurance was made by his guardian was entitled to sue on the contract.

2.4. Alienation under ante-adoption contract

When a boy is validly given in adoption to some other family, it has the effect of transferring the adopted boy from his natural family to the adoptive family as effectively as if he were born in such family. The adoption makes the adopted boy to all intents and purposes the son of his adoptive father as completely as if he had begotten him in lawful wedlock; and the adopted boy acquires the status of a natural born son with its rights, privileges and obligations in the adoptive family. But whilst he so acquires, he loses his status in the natural family and the rights of a son in the family of his birth. After adoption his adoptive father and after him the adoptive mother will be the natural guardian of the adopted son¹,

¹ Derret, Introduction, 121 para 181; Mayne, Hindu law (10th ed.) 302 sec. 231; Sreenarain v. Kishen (1873) 11 BLR 171, 191 (PC); Lakshmibai v. Shridhar (1879) 3 Bom 1; see also Nirvanaya v. Nirvanaya (1885) 9 Bom 365; Monomohini Dasi v. Hari Prasad (1925) 4 Pat 109.

and if his natural parents act as guardian, they would be regarded as de facto guardians¹. The adopted son may, however, give up or modify his rights to property and inheritance in the adoptive family either before² or after³ the adoption. Where the adopted son is a minor his natural father or mother may enter into an agreement before the adoption with the adoptive father or mother so as to limit the minor's rights in the property of his adoptive father⁴. In such cases the question arises: Is the minor bound by such ante-adoption agreement?

Sometimes the Bench⁵ and the Bar⁶ put the question whether, if an act cannot be done by a person as natural father, can it be done by him as de facto guardian. Such a situation arises in the somewhat peculiar case of an ante-adoption alienation. It may happen that at the time of adoption the natural father of a minor adopted son enters into separate agreement with the adoptive parents or agrees by the same instrument of adoption (we understand as a condition of his son's being taken in adoption into a wealthier family) that the adopted son should not challenge the previous alienations⁷, or that the adoptive mother should

1 Sriramulu v. Pundarkakshayya AIR 1949 FC 218.

2 Kashibai v. Tatya (1916) 40 Bom 668; Pandurang v. Narmadabai (1932) 56 Bom 395.

3 S.V. Gupte, Hindu law in British India (Bombay: 2nd ed. 1947), 1001.

4 Mitar Sain v. Data Ram AIR 1926 All 7; Mittar Sain v. Data Ram AIR 1926 All 194; Vithal Laxman v. Yamutai (1934) 58 Bom 234; Krishnayya Rao v. Maharaja of Pithapur (1935) 69 MLJ 388(PC)

5 Krishnamurthi v. Krishnamurthi AIR 1927 PC 139, 145.

6 Seethiah v. Mutyalu AIR 1931 Mad 106, 109. (The counsel for the defendants-appellants raised the question).

7 Ramaswami Aiyar v. Vencataramaiyan (1879) 6 IA 196 (PC).

be in possession of the whole property during her lifetime¹, or that half of the property would be taken by the widow absolutely², or that a portion of the property would be enjoyed by the daughters of the adoptive father³, or that the adoptive mother should be allowed to give some property to her own brother⁴, or that a fixed sum of money would be given in charity annually⁵, or that the adoptive father should be allowed to dispose of all the property in any way he pleased⁶, or that the adopted son would have no right of any kind to the adoptive father's property during the lifetime of the adoptive parents⁷, and the like.

2.4.1. Conservative view

The conservative view of law on this point is that the natural father loses all power over the son from the moment when he is adopted, and that the adopted son has in his new family precisely the same rights as a natural son, save when there arises a competition between the adopted

1 Chitko Raghunath v. Janaki (1874) 11 Bom HC Rep 199; Ravji Vinayakrav v. Lakshmibai (1887) 11 Bom 381; Bhaiya Rabidat Singh v. Maharani Indar Kunwar (1888) 16 IA 53 (PC); Lakshmi v. Subramanya (1889) 12 Mad 490; Narayanasami v. Ramasami (1891) 14 Mad 172.

2 Vinayak Narayan v. Govindrav Chintaman (1869) 6 Bom HC Rep 244; Radhabai v. Ganesh Tatya (1878) 3 Bom 7; Jagannadha v. Papamma (1892) 16 Mad 400; Visalakshi Ammal v. Sivaramien (1904) 27 Mad 577 (FB).

3 Basava v. Lingangauda (1895) 19 Bom 428; Vyascharyar v. Venkubai (1913) 37 Bom 251.

4 Venkappa v. Fakirgowda (1906) 8 Bom LR 346.

5 Ganapati Ayyan v. Savithri Ammal (1897) 21 Mad 10; Balakrishna Motiram v. Shri Uttar Narayan (1919) 43 Bom 542.

6 Parvatibai v. Vishvanath (1925) 27 Bom LR 1509.

7 Pemraj v. Rajibai (1937) 39 Bom LR 1069.

son and a subsequently born legitimate son. Thus the agreement by the natural father cannot prejudice the right of the adopted son in his adoptive parents' properties. However much a father may judge ex hypothesi that it would be more expedient for his son to be adopted¹, even though his rights are limited, than not to be adopted at all, his acts cannot bind a right that begins as his authority ends.

2.4.2. Farran's rule and half-loaf

As far back as in 1887 in Ravji Vinayakrav v. Lakshmibai² where a son was adopted by a widow under an agreement with the natural father that she should have full enjoyment of the property for her life, Farran, J., observed³:

"If the stipulations are unreasonable, such as giving to the widow an absolute power of disposition over the property, they should be rejected as ultra vires of the father; if reasonable, such as only to define and limit the son's enjoyment of the property, they should be upheld".

The learned judge formulated his rule on the basis of Mayne's observation⁴ on minor's liability for his guardian's act, and supported it by custom. Lord Macnaghten⁵, however, expressed his doubt and said that it was difficult "to understand how an agreement by a natural father could prejudice

1 Derrett, Critique, 136 para 175. Mostly parents give their children in adoption for their better and secured financial future.

2 (1887) 11 Bom 381.

3 Ibid, 403.

4 Hindu law (Madras: 1st ed., 1878), 172 sec 193. The following sentence was quoted in the judgment: "He (minor) will also be bound by the act of his guardian, when bona fide and for his interest, and when it is such as the infant might reasonably and prudently have done himself, if he had been of full age".

5 Bhaiya Rabidat Singh v. Maharani Indar Kunwar (1888) 16 IA 53, 59 (PC).

or affect the rights of his son, which could only arise when his parental control and authority determined and that if conditions were attached to the adoption, the analogy, such as it is, presented by the doctrines of Courts of Equity in this country relating to the execution of powers of appointment would rather suggest that, even in that case, the adoption would have been valid and the conditions void". A Full Bench of the Madras High Court¹ put a gloss upon Farran's rule and held that an ante-adoption agreement when it formed part of the negotiations preceeding the adoption, and was embodied in the deed of adoption, came within the powers of the father acting as guardian of his son in giving him in adoption, and would bind the son if "the agreement in regard to the property was in itself a fair and reasonable one, and one which, taken as part of the contract for the adoption, was for the minor's benefit, as being a condition on which alone the adoption would be made". Their Lordships of the Privy Council in Krishnamurthi v. Krishnamurthi² observed that the quotation³ on which Farran, J., formulated his rule was from the third edition of Mayne's Hindu law, and that the quotation itself being unsound was corrected by Mr. Mayne in all the subsequent editions by inserting between the words 'guardian' and 'when bona fide' the words 'in the management of the estate'. Therefore, their Lordships felt it impossible

1 Visalakshi Ammal v. Sivaramien (1904) 27 Mad 577 (FB).

2 AIR 1927 PC 139.

3 See supra, 313 f.n. 4.

to ascribe any value to the guardianship power of the natural father to bind the son as to property, in which he could not have an interest until the time when guardianship had ceased. In Krishnamurthi's case before the adoption of his son the natural father entered into an agreement with the adoptive father under which the latter could dispose of some portions of his property, and accordingly before his death he gave some property to his wife for her life and some to persons who were not within degrees entitled to maintenance, i.e., strangers. Their Lordships observed¹:

"When a disposition is made inter vivos by one who has full power over property under which a portion of that property is carried away, it is clear that no rights of a son who is subsequently adopted can affect that portion which is disposed of. The same is true when the disposition is by will and the adoption is subsequently made by a widow who has been given power to adopt. For the will speaks as at the death of the testator, and the property is carried away before the adoption takes place. It is also obvious that the consent or non-consent of the natural father cannot in such cases affect the question. But it is quite different when the adoption is antecedent to the date at which the disposition is meant to take effect. The rights which flow from adoption are immediate and the disposition, if given effect to, is inconsistent with these rights and cannot of itself vi propria affect them. There are two propositions so well settled that no authority need be cited. They are, first, that the natural father loses all power over the son from the moment when he is adopted, and, second that the adopted son has in his new family precisely the same rights as a natural son, save only when the question is one that raises a competition between the natural and the adopted son".

Their Lordships eventually held that the only ground on which an ante-adoption agreement with the natural father

¹ AIR 1927 PC 139, 144-45.

could be sanctioned was custom, that an agreement giving a life interest in the whole property to the widow would be valid if the adopted son could take it on her death, and that "as soon, however, as the arrangements go beyond that, i.e., either give the widow property absolutely or give the property to strangers, they think no custom as to this has been proved to exist and that such arrangements are against the radical view of the Hindu law". Their Lordships also sounded a note of warning against the 'half-loaf' notion in the following words¹:

"Their Lordships are, therefore, against the idea of a general proposition that all arrangements consented to by a natural father and of benefit in the sense that half a loaf being better than no bread, he is better with an adoption with truncated rights than with no adoption at all, are valid".

The validity of an ante-adoption agreements came before a Division Bench of the Madras High Court in Raju v. Nagamma² where an agreement was made with the consent of the natural father of the minor adopted son before the adoption, and it was arranged that a portion of the adoptive father's property would be absolutely given to the adoptive mother. The learned judges held the agreement as binding on the adopted son, because they thought the arrangement was fair, reasonable and beneficial to the adopted son. Although the decision seemed to have followed Farran's rule with its fair and reasonable gloss, it overlooked the warning of their

1 AIR 1927 PC 139, 146.

2 (1929) 52 Mad 128.

Lordships in Krishnamurthi's case. Ramesam, J., explained the Privy Council decision to mean that if an absolute interest was given to the widow in some items of the property which did not amount to practically the whole of the property, or as the learned judge said, if a substantial part of the property was still left for the adopted son, the arrangement could be regarded still as fair and beneficial and therefore would be valid¹. Venkatasubba Rao, J., observed that for determining the validity of ante-adoption arrangements the tests laid down in Visalakshi Ammal's case should be applied².

Following the decision in Krishnamurthi's case a Division Bench of the Bombay High Court in Pemraj v. Rajibai³ held invalid an agreement entered into between the natural father and adoptive father, which provided that during the lifetime of the adoptive father and mother or either of them the adopted son would have no right of any kind to the adopted father's property, and also that an adoptive aunt who had no legal claim against the property would be maintained. An ante-adoption agreement which provides that the widow should manage and enjoy the whole of her husband's property during her lifetime and that the adopted son would take possession of and manage it after her death is not unfair, but if the widow after such an arrangement alienates practically the whole of the property, it cannot be justified on grounds of custom⁴.

1 (1929) 52 Mad 128, 133.

2 Ibid, 140.

3 (1937) 39 Bom LR 1069, 1071.

4 Shankardas v. Channappa (1938) 40 Bom LR 443.

2.4.3. Modern position

Very recently the question of ante-adoption arrangements came before the Bombay High Court in Ramchandra Ganpati v. Rajaram¹. The facts of the case show that by an agreement arrived at between the natural father of the adopted son, the adoptive mother and the purchaser, all of whom were closely related to each other, a small portion of her husband's property was given absolutely to the adoptive mother, and she sold it to the purchaser for valuable consideration in pursuance of that arrangement. Explaining Krishnamurthi's case Shah, A.C.J., who was sitting alone agreed with the decision of the Madras High Court in Raju's case wherein, as we have seen above, some portion of the property was absolutely given to the adoptive mother, and held that the sale deed executed by the adoptive mother in favour of the purchaser was binding on the adopted son, and that it could not be challenged.

After the passing of the Hindu Adoptions and Maintenance Act (Act 78) of 1956 an adoption does no more deprive the adoptive father or mother of the power to dispose of his or her property. Section 13 of the Act provides:

"Subject to any agreement to the contrary, an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer inter vivos or by will".

Neither the HAMA of 1956 has affected the recent decisions, nor the Hindu Succession Act (Act 30) of 1956 has necessarily turned the adoptive mother's property into an absolute estate in every case. Where the widow taking

¹ (1974) 77 Bom LR 62.

the boy in adoption induces the natural father to agree on the minor's behalf to her alienating a substantial but not unreasonable portion of the inherited estate to her own nominee, this will still be binding on the son when he comes of age under the Privy Council ruling. This will be envisaged only where, under the terms of the widow's deceased husband's will she takes a share of his estate subject to the limited estate or subject to the limitation that on her death or remarriage it shall revert to the testator's next heir. When she inherits for an absolute estate no question of divesting can arise¹ and therefore there is no need whatever for any such bargain in the widow's favour.

3. De facto guardianship and the HMGA

3.1. Section 11 of the HMGA

Section 11 of the HMGA has brought about a radical change in the law relating to de facto guardians in India. The section runs as follows:

"After the commencement of this Act, no person shall be entitled to dispose of, or deal with, the property of a Hindu minor merely on the ground of his or her being the de facto guardian of the minor".

There is a controversy whether this section has abolished the de facto guardianship. S.V. Gupte² rightly says "This section does not prevent a person from acting

¹ Sections 12 and 14, HSA 1956.

² Hindu law of Adoption, Maintenance, Minority and Guardianship (Bombay: 1970), 416.

as de facto guardian of the property or person of a minor". M.W. Pradhan ¹ says that this section abolishes de facto guardians as it is no longer felt necessary to grant recognition to them. But even a plain reading of the section would show that it has not abolished de facto guardianship. As seen earlier, section 4(b) of the HMGA defines a guardian as a person having the care of the person of a minor or of his property, and includes a natural, testamentary, certificated guardian and a guardian appointed by any court of wards. When any person having the care of the person or property of a minor or of both his person and property may be included in the definition of a guardian, there is no difference between section 4(b) of the HMGA and section 4(2) of the GWA which includes all the four types of guardians² enumerated in section 4(b) of the HMGA along with de facto guardians³. The HMGA has not laid down anywhere that the person having the care of the person or property must have it by the authority of law. Thus there is every reason to believe that the HMGA has not abolished de facto guardianship as a whole; it has limited or restricted those powers merely. Derrett said prior to the enactment of the Bill⁴:

"Of course one can hardly abolish de facto guardians by statute but one can certainly prevent by this means the speedy and effectual act of an adult, on behalf of a minor whose natural guardians (i.e. parents) have died in some calamity, which would secure to the minor financial security and comparative independence. The law has in the past given the de facto guardian his status because it was necessary to protect an honest man who was willing

1 Guardianship Acts, 229. A similar view was expressed obiter by Chagla, C.J., in Narayan v. Ramchandra AIR 1957 Bom 146 (FB).

2 Pradhan, Guardianship Acts, 14.

3 Ibid, 15. So Gupte, Hindu law of Adoption, 416.

4 'The Hindu Minority and Guardianship Bill, 1953' in (1953) 55 Bom LR (Jour) 89-94, 90.

to buy property belonging to a minor and give value to it, though the person actually making the transfer were merely an adult who had, out of charity, taken on some responsibilities with regard to the person and property of the minor, and was not a certificated guardian. Similarly if an orphan were taken in by his maternal uncle and housed and educated at his expense there is no doubt but that ... that uncle would have rights of indemnity against the estate of his de facto ward, notwithstanding the lack of appointment, and similarly a lender to the uncle for the minor's purposes would have a right of subrogation against the estate of the minor. We cannot abolish the de facto guardian altogether since the effects would be monstrously inequitable".

B.B. Mitra says that section 11 has merely prevented a de facto guardian from disposing of or dealing with the property of a minor¹. So also Mulla says²:

"The present section now does away with the authority of any person to deal with or dispose of any property of a Hindu minor on the ground of his being the de facto guardian of such minor".

The mere repetition of the statute's phraseology is hardly illuminating. It is already clear that under the pre-1956 Hindu law a de facto guardian, although he lacked any statutory recognition, had full judicial recognition and enjoyed all the powers of a natural or legal guardian with regard to the alienation or acquisition of property either on behalf of or for the benefit of the minor. But under the HMGA if section 5 which contains the overriding effect of the Act, is read along with section 11, it would appear that he would have no power to dispose of or deal

1 Guardians and Wards Act, 391.

2 Hindu law (14th ed.), 974.

with a minor's property, and thus even the rule in Hunoomanpersaud's case and the interpretations made thereon stand overridden. Gupte not unnaturally asks if the de facto guardian retains powers mentioned in section 8(1) but none of those mentioned in section 8(2) of the Act.

Section 5 of the HMGA in fact provides as follows:

"Save as otherwise expressly provided in this Act,---

- (a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
- (b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act".

Derrett has offered two interpretations of section 11.

He says¹:

"According to the first the de facto guardian of a minor is reduced to the position of a de facto guardian of a lunatic adult. All his dispositions on the minor's behalf are void, and even his receipts for the minor's debts are unable to discharge the minor's debtors, even if they are evidence against the guardian that he has received money to the use of the minor. The de facto guardian is therefore abolished. Since a minor cannot under the modern law of India appoint a guardian if he cannot appoint a de facto guardian, and since a very young child cannot purport to appoint anybody under any provision of law, this is highly inconvenient. It is very doubtful whether the common law rule enabling the minor to appoint a guardian can be taken away by the words of section 11, and if the de facto guardian is saved in such instances there is every likelihood that he is saved in the other instances also.

1 Introduction, 85 para 111.

If the section had said that the acts of the de facto guardian should be null and void, thus preserving the liability of the guardian for receipts, whilst destroying his capacity to alienate, no room for doubt would remain. But the second line of interpretation takes advantage of the words, 'entitled to dispose' and interprets them strictly. No guardian by virtue of his guardianship has any title in the property of his ward, but his office, established by law, entitles him to make alienations which will bind the minor's estate. The previous state of the law, by which, in certain circumstances, a de facto guardian was entitled to bind the minor's estate, is not, it is submitted, altered by section 11. What the statute aims to prevent, it would seem, is an alienee claiming against a minor on the ground that the alienor (the guardian) was entitled to alienate to him 'merely on the ground of his or her being the de facto guardian'. In other words, where the alienee can show that the alienation was on the ground of the minor's necessities or the evident benefit of the minor's estate, and not merely the character which the de facto guardian enjoyed for the time being as the minor's general representative, the alienee was to be protected exactly as under the previous system, to which we must necessarily refer as the continuing law of India in reference to Hindu minors. The marginal note, 'De facto guardian not to deal with minor's property', does not control the meaning of the plain words of the section, and we must interpret the statute in such a way that its plain words take effect, particularly when their effect is consistent with the intention which, on other grounds, we may believe Parliament had. An interpretation which, relying upon the marginal note alone, attempted to destroy the institution of the de facto guardian, would create more inconveniences than it would solve".

Commenting on these interpretations B.N. Sampath observes¹:

"Professor Derrett's interpretation, though it flows from a literal rendering of the section, is not tenable in the light of the other provisions of the Act. It cannot be disputed that a natural guardian, a guardian appointed by the

1 'Authority of the de facto guardian in Hindu law: an appraisal' in (1969) 2 SCJ 70-78, 77.

court or even a testamentary guardian has a better 'locus standi' than a de facto guardian. We have earlier noticed that the right of a natural guardian to alienate the property of the minor was extended to the de facto guardian only by judicial rationalization. Now when the Act has circumscribed in section 8 the authority of a natural guardian to deal with the estate of the minor and has further taken away from him the right to alienate the property without the prior permission of the court even in case of necessity, it will not be consistent with the attitude of the Act to say that the de facto guardian can alienate the property in case of necessity, which in effect means that a de facto guardian is in a better position than a de jure guardian. Further this interpretation ignores the fact that the section has dealt with two different modes of action on the part of the guardian, namely, 'to dispose of' and 'to deal with'. This interpretation takes care of the expression 'to dispose of ... merely on the ground of his or her being the de facto guardian' but it does not account for 'to deal with the property merely on the ground of his or her being the de facto guardian'. The meaning of the latter clause is obvious, that a de facto guardian shall not meddle with the property of the minor".

Raghavachariar says¹ that under section 11 any alienation made by the de facto guardian of a minor's property is on the same footing as that made by any ad hoc guardian, and is invalid and not binding on the minor even if it is beneficial to the interests of the minor. Under the heading 'Reason for the abolition of de facto guardianship' the writer points out that the doctrine of the de facto guardianship enunciated in Hunoomanpersaud's case had had its origin in the practical equity of the Hindu jurists who felt the necessity of protecting the transactions entered into

1 Hindu law (6th ed.), 1144.

for the minor's benefit or necessity by one interested in the minor and who took charge of the management of his property for the minor's benefit, and then observes¹:

"When the character of the people changed and the high ideals of generosity and philanthropy gave place to selfishness and dishonesty with the rapid growth in the ideas of individualism and separate property, the institution of de facto guardianship underwent a corresponding deterioration and became an easy instrument of unscrupulous profit of friends and relations at the cost of the minor. Wherever there was a minor with any sizable estate with no parent to care for his interest and welfare, there was a race amongst the minor's greedy kinsmen to clutch at his property and deal with it to their advantage posing as the de facto guardians of the minor. Cases were not uncommon of several persons claiming to be the de facto guardians of the same minor and alienating the minor's property for ostensible necessity or benefit which had no existence in reality but concocted for the purpose or by the ingenuity of dishonesty, and one not infrequently finds the minor once possessed of a prosperous estate reduced to the brink of bankruptcy when he attains the age of majority. On account of the growing frequency of such cases, it was thought desirable to abolish the de facto guardianship altogether so that no further encouragement might be given to such dishonest relations of the minors out to profit at another's cost".

That the dishonest practices by the de facto guardians with the minors' properties restricted the powers of such de facto guardians is also expressed by Derrett when he says² that the powers of alienation possessed by a guardian as an honest de facto guardian are peculiar and are not yet finally determined in spite of numerous dicta in reported cases, and that the suspicion of intermeddling by dishonest

1 Raghavavachariar, Hindu law (6th ed.), 1145.

2 Introduction, 85 para 110.

and incompetent persons under the pretence of saving the minor's property where no legal guardian exists led to Parliament's obscuring the legal position by providing section 11 in the HMGA. Or as he surmised¹ the Parliament passed the section to protect the property of minors which the de facto guardians or strangers, as they often are, were making away with under the cover of minor's necessity or benefit.

The suspicion or distrust which today is apprehended of a de facto guardian cannot be ignored altogether, but at the same time it would not be fair to say like Raghava-chariar that all people who assume the duty of a de facto guardian have given themselves up to such vices. By 'abolishing' de facto guardianship has Parliament solved all the need and problems that caused the growth of the institution? The diverse social set-up and bad communication system, the unforeseen urgency for money and poor financial condition of the people, and dearth and delay of law courts and the fear of financial involvement in litigation, as it often turns out on a guardianship application, prompted the courts to recognise de facto guardianship in the past, and it rendered wonderful services to the society for more than a century. These conditions are still there, and more acutely. The usefulness of de facto guardianship in time of distress, the haste with which a transaction could be effected under it and less cost for such guardianship

1 Derrett, Critique, 175 para 224.

procedure have in no way diminished its utility, rather increased it enormously.

Of the two interpretations given by Derrett¹, undoubtedly the second one has much to commend the de facto guardianship. We have seen earlier that sastric texts did not entitle any person other than manager as of right to alienate the family property! What they laid down was that if any member of a family or any person attached to the family made an alienation of the family property or incurred any debt under certain circumstances, the house-keeper or manager was bound to honour it or repay it and could not avoid it by pleading want of authority on the part of the person who actually alienated the property or contracted the debt. When the alienee sought to bind the manager or the estate he did not base his claim on the authority of the alienor, but on the necessity for the alienation or the benefit accruing to the family estate from such alienation or debt. So also in the case of de facto guardianship the guardian is not entitled to alienate, but it is his position and the necessity of the minor that justify the alienation. That legal necessity for the alienation and not the legal authority of the person effecting the alienation was at the root of the validity of a de facto guardian's acts was admitted by the learned judges of the Federal Court in Sriramulu's case.

1 See supra, 322-23.

Kania, C.J., observed¹:

"On first principles, it appears clear that a manager, who manages the estate of the minor because he finds it necessary to do so, although he has no legal title to handle the estate, must have his powers circumscribed by the limits of the necessity or benefit to the estate of the minor. The law has tried to find a solution out of two difficult situations . When a Hindu minor has no legal guardian, there will be no one who can handle and manage his estate in law, so that unless some one is deemed to have authority, the minor will not receive any income or return from his estates. The second point is that a person having no title cannot be permitted to intermeddle with the minor's estate so as to cause a loss to the minor. Judicial decisions have tried to find a way out of these difficulties".

All the four learned judges of the Federal Court held that an alienation by a de facto guardian or manager would be valid if made for the minor's necessity or benefit of his estate. Derrett also says²:

"The great feature of Hindu law ... is the authority of the guardian to act for necessity or benefit of the estate independently of any court order and without fear of personal liability in the event that a successful attack might be launched against the transaction, on the ground that it was not objectively justified, provided he acts honestly in the minor's best interests. That feature is in great danger of being obscured if the HMGA is construed in a manner hostile to Hindu tradition".

As seen already Derrett³ has interpreted section 11 in this way that if an alienee can show that the alienation was on the ground of the minor's necessities or the evident benefit of the minor's estate, and not merely of the

1 AIR 1949 FC 218, 222.

2 Critique, 176 para 225.

3 See supra, 322-23.

character which the de facto guardian enjoyed for the time being as the minor's representative, the alienee could be protected exactly as under the previous system, i.e., the Anglo-Hindu law, and he would not come within the mischief of the section since his act in respect of the minor's property was not done on the basis of his being entitled to do it. T.L. Venkatarama Iyer (a former Justice of the Supreme Court) observes¹:

"If, as seems probable, the section and also the marginal note --- which, of course, cannot be referred to for construing the section --- were both intended to give effect to these observations (viz., observations of the learned judges in Sriramulu's case that a de facto guardian could validly alienate for necessity or benefit of the minor), then the opinion expressed by the author [Dr. Derrett] becomes unassailable".

Although B.N. Sampath is firm in his conviction that the provision of section 11 has abolished de facto guardianship, he feels the latter's necessity keenly when he says²:

"In the present state of the Hindu society and the pattern of judicial administration abolition of de facto guardianship creates several practical problems. It may be urged that those who would have otherwise acted as de facto guardians should get themselves appointed as legal guardians and to this extent they have to put up with the inconvenience of the legal process. If they are so disinclined to undertake even that much inconvenience, law cannot help because nobody compels an unwilling party to take up the responsibility of guardianship. Though there is some substance in this connection, it must be confessed that in the prevailing state of judicial administration the appointment of even ad hoc legal guardians involves considerable inconvenience and expense

1 (1966) 29 Bulletin of the School of Oriental and African Studies, 172-174, 173.

2 (1969) 2 SCJ 70-78, 77-78.

and may indeed deter any well-intentioned relative or acquaintance from seeking the appointment. Further, either due to ignorance or with a view to avoid the pin pricks of legal process the de facto guardians may ignore the provisions of the Act. Thus in the absence of follow-up action to gear up judicial administration with regard to the appointment of ad hoc legal guardians, the abolition of de facto guardianship would foster litigation with respect to the property of the minors which indeed is antithetical to the very objective of the Act".

L.S. Sastri observes¹:

"A de facto guardian means ... one who has taken up the care and protection of the minor and his property in the absence of a de jure guardian ... ordinarily a relative of the minor, who is left helpless by destiny and whom chance has thrown in the hands of the benefactor. The minor's property may not be large and may be just sufficient for the up-keep of the minor. It may not permit the taking of proceedings in court for getting the de facto guardian appointed or declared guardian under the Guardians and Wards Act. In India, how many such cases are there? If the masses are considered, they must be numerous. Now, according to the Joint Committee, this clause 'abolishes de facto guardians'. It is an obvious mistake. The relationship cannot be abolished, it will continue to exist perpetually. The utmost that can be said is that such a guardian, however disinterested and philanthropic his action may be, has no power, in law to alienate or deal with the minor's property".

Following the second interpretation of Derrett, Paras Diwan considers that section 11 has not abolished de facto guardianship. He observes²:

"In cases where minor's property is not much, or in cases where a person is not willing to take the pain and expenses of getting oneself appointed a guardian, yet he is willing to act in the interest of the minor, in our peculiar social context, de facto guardian fulfills a social need. Then it should not be forgotten that if de facto guardian has powers of a guardian, he also has the liabilities of a guardian. On the other hand, if he is just treated as an intermeddler or a trespasser, no liability

1 Hindu Minority and Guardianship Act, 1956 (Allahabad: 1958), 56.

2 Hindu law (2nd ed., 1974), 231.

which arises on account of guardian's fiduciary character can be imposed on him".

One thing is clear from the observations of different commentators that the necessity for de facto guardianship is still there in full force in society. In this state of affairs when the HMGA has not stated categorically that the acts of a de facto guardian are void¹, the de facto guardianship should not be treated as abolished. On the contrary, a de facto guardian should be allowed to enjoy the same powers and position as he used to do before. If, however, section 11 is construed to have abolished it, it is necessary either, as Derrett has suggested² to amend section 11 "to enable (i) de facto guardians to have powers similar to those of natural guardians provided that they conform to the requirements of de facto guardianship as under Anglo-Hindu law; (ii) alienees from these and all guardians other than the appointed guardian to take advantage of the rule in Hunoomanpersaud's case", or quietly adopt his second interpretation of section 11 and allow a de facto guardian to enjoy all the powers and position as he enjoyed under Anglo-Hindu law. But the adoption of this interpretation would be difficult so long as the language of section 11 is not changed to show that de facto guardians have all their previous powers, since between an ambiguous statute and a 'forward-looking'

1 Derrett, Introduction, 85 para 110.

2 Critique, Appendix III, 434.

precedent the former would tempt even a 'socially-committed' judge.

3.2. Section 11 and the courts

There are certain recent cases in which it has been held that in view of section 11 a de facto guardian cannot alienate a minor's property. In Rajalakshmi v. Ramachandran¹ Natesan, J., observed:

"One vital and important change introduced in the Hindu law relating to minors is that relating to the power of a de facto guardian. Under the Hindu law the powers of a de facto guardian or a de facto manager of a Hindu minor's property to bind the minor's estate by alienations of immovable property of the minor in case of necessity or for the benefit of the minor's estate have been recognised in numerous decisions. Section 11 of the Act now takes away these powers completely".

In Narain Singh v. Sapurna Kuer² where a mother acting as the guardian of her minor son sold the minor's property when the minor's father was alive, Mahapatra, J., sitting alone held that as long as the father was alive the mother could not claim to be the competent natural guardian of a Hindu minor and she would have no authority whatsoever to act as a guardian for the purpose of disposing of the minor's property as she would not come under any of the categories given in section 4(b) read with section 6 of the HMGA, de facto guardianship being abolished under section 11. It was further held that where the father refused to act as the natural guardian or neglected to discharge his obligations

¹ (1966) 2 MLJ 420, 422-23.

² AIR 1968 Pat 318.

as a natural guardian in respect of the minor, his affairs and properties, the mother could take recourse to legal proceedings and obtain powers to act as the guardian of the minor¹. In Gurumurthy v. Raghu Podhan² the Orissa High Court held that the doctrine of legal necessity as enunciated in Hunoomanpersaud's case, under which a de facto guardian could validly alienate a minor's property, was abrogated by section 11 of the HMGA, and that a sale by a de facto guardian was void ab initio under section 11 and the alienee from him would be a rank trespasser. The facts of the case show that the natural mother of a minor son acting as de facto guardian sold some homestead land by a registered deed, which the minor inherited from his adoptive father. In Sohrab Khan v. Deputy Director of Consolidation³ brothers acting as the de facto guardians of their minor brother transferred the latter's property while their mother was alive. The mother being the natural guardian Gulati, J., held that the provisions of section 11 contained an absolute prohibition against the transfer of a Hindu minor's property by his de facto guardian, and that since under section 8 of the HMGA only the natural guardian was permitted to deal with the minor's property with the permission of the court, the alienation was absolutely void. A Division Bench of the Mysore High Court in Talari Erappa v. Muthyalappa⁴ also

1 cp., Mayilswami Chettiar v. Kaliammal (1969) 1 MLJ 177.

2 AIR 1967 Ori 68.

3 (1970) 68 All LJ 288, 290.

4 AIR 1972 Mys 31, 33.

held that after the coming into force of the HMGA under no circumstances could a de facto guardian transfer the minor's property on the ground of his being a de facto guardian, and that under section 11 a sale made by such a guardian would be void and the minor on attaining majority could not validate such a sale by ratification.

The negative decisions in cases where a person acted as the de facto guardian of a minor while a natural guardian was alive and either neglected or refused to act, seem to have been considerably shaken by the Supreme Court decision in Jijabai v. Pathankhan¹. The court said that if the father refused to act as guardian and the mother was in the management of the minor's property for several years then she would be able to bind the minor by granting a lease of the minor's land in the course of proper management of the property. Vaidialingam, J., observed that, although normally when the father was alive he was the natural guardian and it was only after him the mother could become the natural guardian, the mother, in such circumstances as in the instant case, could be treated as the natural guardian. Although the learned judge treated the mother as a natural guardian, actually she was a guardian of necessity or what was in Anglo-Hindu law a de facto guardian. Section 6(a) and (b) of the HMGA does not say that both the father and the mother could become natural guardian at the same

¹ AIR 1971 SC 315, 319.

time. The section plainly shows that the natural guardianship of one does not arise when that of the other continues, i.e., under sub-section (a) the mother cannot become the natural guardian of her son or unmarried daughter while the father is alive or until he becomes disentitled to act as such under the proviso of the section, so also under sub-section (b) the father cannot be the natural guardian of his illegitimate son or illegitimate unmarried daughter so long as the mother is alive and not disentitled under the said proviso. When either of the parents is acting as natural guardian, the other cannot have that character. If he or she performs the duty of a guardian, he or she should be treated as a de facto guardian¹ as he or she used to be under Anglo-Hindu law. In what may, popularly, be called a 'break through' the Supreme Court's decision in Jijabai's case may be taken to have indirectly recognised the institution of de facto guardianship or at least recognised the necessity for it.

Until the ambiguous section 11 is amended as suggested by Derrett or Sampath the courts may follow this decision and hold the persons who are in the actual management of minors' properties and who are not complete strangers as de facto guardians of the minors, and their acts in respect of property as binding on the minors if effected for the benefit and necessity of the minors. Such a view was expressed

¹ Manishankar v. Bai Muli (1888) 12 Bom 686; Arunachala Reddi v. Chidambara Reddi (1902) 13 MLJ 223; Kundan Lal v. Beni Prasad (1931) 137 IC 115; Mayilswami Chettiar v. Kalliammal (1969) 1 MLJ 177.

by all the learned judges of the Federal Court in Sriramulu's case. The Allahabad High Court in Kumar v. Onkar Nath¹ said that even if the father was alive, the mother was competent to give a notice of demand for rents and dues and also to file a suit on behalf of the minor. Trivedi, J., observed that giving of notice of demand and filing the suit was not disposing of or dealing with the property of a minor as understood by section 11 of the HMGA and that since a next friend could under Order 32 Rule of the Civil Procedure Code (Act 5) of 1908 file a suit on a minor's behalf, the mother could file a suit and give a notice. Whether she may be called a next friend or a de facto guardian, the fact that she could work as such with respect to a minor's property sufficiently indicates that some person other than a natural guardian may work even when the latter is alive and the courts recognise such work. It speaks at least of the necessity of de facto guardianship.

Recently in Ranganatha Gounder v. Kuppuswami Naidu² Ismail, J., of the Madras High Court treated the mother as de facto guardian while the father was still alive, but the learned judge denied her the authority which the Supreme Court extended to her in Jijabai's case. The facts of the two cases are identical excepting that in the High Court case it is not clear whether the father refused or neglected to act as the natural guardian and the mother was in the

1 AIR 1972 All 81.

2 (1976) 2 MLJ 128.

actual management of the minor's property. The learned High Court judge did not refer to the Supreme Court case, on the contrary, followed Rajalakshmi's case which was a case of his own High Court but which was regarding some illegitimate Hindu minors on whom the wife of their putative father settled some properties by a deed of settlement. The putative father mortgaged some of these properties without being appointed a guardian by the court and when the natural mother of the minors was alive. If it was known what part the father played in the management of the minors' properties the case could have been distinguished from the Supreme Court case.

As long as the minors have properties the necessity of de facto guardianship would be there. Social and economic condition of the common people, the poor distribution of judicial machineries and their scanty number in proportion to the ever increasing population of the Subcontinent do not allow every child to come to the court and get appointed a guardian. The old habits would continue; either a member of the family or a near relation or an immediate neighbour would act as a guardian. The Indian Parliament may deny to recognise them as de facto guardians, but the courts would find them. Indeed it is unwise to restrict the powers of a de facto guardian before effecting a thorough overhauling of the socio-economic condition of the people, a thorough improvement of the communication system and a thorough resetting and renovation of the judiciary.

4. Specific performance of a guardian's contract

We have seen in chapter 2 that according to the Privy Council decisions in Waghela Rajsanji's and Indur Chunder's case a guardian of a minor could not enter into a contract on the minor's behalf if it imposed a personal liability on the minor, and the minor's estate could not be made liable for such contract unless the guardian showed by acts and behaviour that he acted on behalf of the minor. Despite section 11 of the Contract Act the Indian courts were holding that a minor's contracts were voidable¹, but in Mohori Bibee's case² it was held that such contracts were absolutely void. The question of specific performance of a guardian's contract did not come before the Privy Council until 1911 when in Mir Sarwarjan v. Fakhruddin Mahomed³ the question was raised for decision: Can specific performance of a contract validly entered into on behalf of a minor be enforced? Lord Macnaghten who delivered the judgment of the Judicial Committee held that it was not within the competence of a manager of a minor's estate or within the competence

1 Rennie v. Gunga Narain (1865) 3 WR 10 (CR); Hari Ram v. Jiban Ram (1869) 3 BLR 426; Boiddonath v. Ram Kishore (1870) 13 WR 166 (CR); Doorga Churan v. Ram Narain (1870) 13 WR 172 (CR); Hanmant v. Jayarao Narsinha (1888) 13 Bom 50; Mahomed Arif v. Saraswati Debya (1891) 18 Cal 259; Krishnasami v. Sundarappayyar (1895) 18 Mad 415.

2 (1903) 30 IA 114 (PC).

3 (1911) 39 IA 1 (PC).

of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immovable property, and that as the minor was not bound by the contract, there was no mutuality and therefore the minor could not obtain specific performance of the contract. This decision was not uniformly understood by the judges of the Indian courts, and as a result different High Courts were holding conflicting views on the question until very recently when the Privy Council case was distinguished as a Muslim case¹ and its decision was thought to be confined to Muslim cases only. Before discussing the Privy Council case we must see in short how specific performance is dependent on 'mutuality'.

4.1. Doctrine of mutuality

The doctrine of mutuality means that the contract should be mutually enforceable by each party against the other, and not that right for right there must be a corresponding clause in the contract which may contain a series of clauses. Mutuality does not mean equality and exact arithmetical correspondence. It means that each party must have the freedom to enforce his rights

¹ Derrett, 'The power of guardians of non-Muslim minors: a sad misunderstanding', in (1967) 1 MLJ 15-20. See also Suryaprakasam v. Gangaraju AIR 1956 AP 33, 38; Vijaykumar v. Gokulchand (1964) 68 Bom LR 891, 894.

under the contract against the other¹. Fry observes²:

"A contract to be specifically enforced by the court must, as a general rule, be mutual, --- that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. When, therefore, whether from personal incapacity to contract, or the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is, generally, incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former".

Before Mir Sarwarjan's case the doctrine of mutuality was not recognised in India; it was only after this Privy Council case that it began to be applied by the Indian courts to their cases³. Although it is generally agreed that for a contract to be specifically enforced there must be mutuality between the parties⁴, there is a difference of opinion as to the requirement of mutuality. According to one view the court should not grant specific performance to one party when it cannot do so at the suit

1 Fazaladdin Mandal v. Panchanan Das AIR 1957 Cal 92, 95 per Bachwat, J.; Dasarath v. Sattyanarayan AIR 1963 Cal 325, 327; Sree Ram v. Ratanlal AIR 1965 All 83, 86.

2 Sir Edward Fry, A Treatise on the Specific Performance of Contracts (London: 6th ed., 1921), 219 sec. 460.

3 Krishnasami v. Sundarappayyar (1895) 18 Mad 415; see also Whitley Stokes, Anglo-Indian Codes Vol. 1, 931; Paras Diwan, 'Powers of the guardian of the minor's property under Hindu law', in (1963) 15/2 Law Review, 142-201, 187.

4 Selton v. Slade (1862) 7 Ves 265; 32 ER 108.

of the other¹. Therefore, a minor cannot enforce a contract by this remedy²; his promise is not specifically enforceable against him, and there is want of mutuality. According to the other view when a person seeking specific performance has completed his part of the contract, he renders the remedy mutual³. The latter view is more popular nowadays, but it cannot be of any use to our purpose, since such a contract cannot be enforced against a minor even though the minor may enforce it⁴. Where a contract is executed in favour of a minor and the minor has fulfilled his part of the contract, there is no need to raise the question of the presence of mutuality. Wallis, C.J., observed in Raghava v. Srinivasa⁵:

"The minor could not bind himself by contract to pay the price or advance the mortgage money; but when he has done so and the vendor or mortgagor has executed a registered conveyance in his favour, is there any reason why the transfer in his favour should not take effect?"

In discussing the scope of the doctrine of mutuality Knight Bruce, V.-C., stated in Salisbury v. Hatcher⁶:

"In cases of specific performance, want of mutuality is generally material, but it is settled, that

1 Snell, Principles of Equity (26th ed.), 648; Fry, Specific Performance (6th ed.), 219; Hanbury and Maudsley, Modern Equity (10th ed.), 50.

2 Flight v. Bolland (1828) 4 Russ 298; 38 ER 817; Lumley v. Ravenscroft (1895) 1 QB 683.

3 Wylson v. Dunn (1887) 34 CH D 569; Langen and Wind Ltd. v. Bell (1972) Ch 685.

4 Raghava v. Srinivasa AIR 1917 Mad 630 (FB).

5 AIR 1917 Mad 630 (FB).

6 (1843) 12 L.J. Ch 68, 70 (NS).

perfect mutuality is not universally requisite, in order to call the powers of a court of equity into action. There are numerous cases in which decrees have been made in favour of parties, who, at the time of the filing of the bill, were not in a state to make an absolute conveyance. Where in such cases there is no invalidity at law, there is a large discretion to be exercised by the court".

It is obvious from the above observations of the Vice-Chancellor that specific performance being an equitable remedy courts may waive the requirement of complete mutuality for the specific performance of a contract, and also under certain circumstances in the exercise of their discretion they can override the doctrine of mutuality¹. However, mutuality is generally expected to be present for the specific performance of an agreement.

After the Privy Council decision in Mohori Bibee's case, where a minor's agreement was declared void, no agreement may be specifically enforced by or against the minor². This does not affect the specific enforcement of a contract entered into by a guardian on a minor's behalf: Both in Flight v. Bolland³ and Mohori Bibee v. Dhurmodas Ghose⁴, where a contract was refused, the contracts were entered

1 For exceptions and limitations to the doctrine of specific performance see Fry, Specific Performance (6th ed.), 223-25 secs. 464-470; Hanbury and Maudsley, Modern Equity (10th ed.), 55-58.

2 Pollock and Mulla, Indian Contract and Specific Relief Acts (9th ed., 1972), 114.

3 (1828) 4 Russ 298; 38 ER 817.

4 (1903) 30 IA 114 (PC).

into with the minors themselves who were seeking to enforce them. Pollock and Mulla say¹ where a contract is entered into on behalf of a minor by his guardian or by a manager of his estate that contract can be specifically enforced by or against the minor, if the contract is one which it is within the competence of the guardian to enter into on his behalf so as to bind him by it, and further if it is for the benefit of the minor. The competency of a guardian referred to here is to be determined by the personal law of the minor. In this respect there would, it is submitted, be no justification for treating the specific performance of contracts of guardians of minors of different communities on different principles or to lay down different principles applicable to them unless the personal law of a minor justified such a distinction². We must now study a case which was the cause of further confusion.

4.2. Mir Sarwarjan's case (1911) and the doctrine of mutuality

The facts of Mir Sarwarjan's case show that one Mr. Garth was the manager of the minor plaintiff's estate and an agent of Mr. Garth had entered into an agreement with Mir Sarwarjan, the defendant, to purchase certain property without any express authority from Mr. Garth.

1 Indian Contract and Specific Relief Acts (9th ed., 1972), 115.

2 In Sriramulu v. Pundarikakshayya AIR 1949 FC 218, 222 Kania, C.J., made a similar observation on a guardian's power to sell a minor's property.

The agreement was subsequently accepted and ratified by the minor, as if the agent had been the minor's agent, which (of course) he was not. On these facts a Division Bench of the Calcutta High Court referred the case to a Full Bench¹ with the following two questions: (1) Can specific performance of a contract validly entered into on behalf of a minor be enforced? and (2) Has the case of Fatima Bibi v. Debnauth Shah² been rightly decided? Maclean, C.J., with whom four other judges of the Full Bench concurred, answered the questions by saying that "if a contract was validly entered into on behalf of a minor and there was mutuality in such contract, it might be specifically enforced", and that Fatima Bibi's case was rightly decided. Applying the principle as suggested by the learned Chief Justice the Division Bench reviewed Fatima Bibi's case and both Rampini and Woodroffe, JJ., found in their independent concurring judgments that Fatima Bibi's case was decided on a misapprehension of facts, since, as the learned judges observed, Norris, J., who decided Fatima Bibi's case, appeared to them to have been under the impression that the contract in Fatima Bibi's case had been entered into by the minor herself and was consequently void. Maclean, C.J., did not minutely consider the facts of Fatima Bibi's case and therefore missed the subtle and important difference between a minor's

1 Mir Sarwar Jan v. Fakharuddin Mahomed Chowdhury (1907) 34 Cal 163, 166 (FB).

2 (1893) 20 Cal 508.

contract and a contract entered into on her behalf by her guardian. The learned judges of the Division Bench found that the contract in Fatima Bibi's case was entered into by the minor's father, Hafiz Abdool Kadir, as guardian of the minor, and that the decision was wrong because, the father being a competent guardian in Muslim law, mutuality was not wanting in that case. On the basis of this finding the learned judges of the Division Bench held that the contract in Mir Sarwarjan's Case (1907) was specifically enforceable as they thought rightly that mutuality was there, and further that there was no difference between the position and powers of a guardian and those of a manager. The case was then taken up on appeal before the Privy Council where their Lordships proceeded on the assumptions of the Calcutta High Court that the contract was intended to bind the minor or the minor's estate and that the purchase was advantageous to the minor¹.

But in considering the opinion of the learned judges of the High Court relating to the difference between the position and powers of a guardian and those of a manager of the minor's property Lord Macnaghten made the following observation²:

"Without some authority their Lordships are unable to accept the view of the learned judges of the Division Bench that there is no difference between the position and powers of a manager and those of a guardian".

1 Mir Sarwarjan v. Fakhruddin Mahomed (1911) 39 IA 1, 5 (PC).

2 Ibid, 6.

And their Lordships held¹;

"It is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immovable property, and ... as the minor in the present case was not bound by the contract, there was no mutuality, and that the minor who has now reached his majority cannot obtain specific performance of the contract".

What led their Lordships to differ with the Division Bench's views? Every case must be decided according to the facts and circumstances of that particular case. It is most interesting that both the Full Bench and the Division Bench of the Calcutta High Court in Mir Sarwarjan's case (1907) overlooked the simple fact that the guardian in Fatima Bibi's case and the manager in Mir Sarwarjan's case (1907) do not stand on the same footing. The guardian in the former was recognised in the personal law of the minor in that case, while the manager in the latter was not recognised either in Muslim law or Hindu Law². Had the latter been appointed under the Court of Wards that would have transpired in the course of argument and that would not have warranted the review of Fatima Bibi's case. Even if he be considered a de facto guardian, the case fails to stand the test of negotiorum gestio which is the root of de facto guardianship³, because the transaction was actually effected by Mr. Garth's agent, Basanta Kumar

1 (1911) 39 IA 1, 6 (PC).

2 In Hindu law to be a manager one must be a coparcener. See Commissioner of I.T. v. Seth Govindram Sugar Mills AIR 1966 SC 24.

3 Derrett, Critique, 431.

Guha, who had no intention to act as a negotiorum gestor¹. On a simple reasoning it appears that the contract in Mir Sarwarjan's case (1911) suffers from a defect. The contract being actually entered into by an agent of the manager was void; there the contracting party on behalf of the minor had no competency to enter into such a contract. Therefore there was no mutuality in Mir Sarwarjan's case. Woodroffe, J., very correctly stated the law that "specific performance may be granted, if the contract be one which, being within the guardian's powers, binds the minor"², but subsequently the learned judge forgot his own statement that the contract must be within the guardian's power when he said³:

"Every case must be considered with reference to its own facts, and there is nothing in the agreement in this suit which in my opinion rendered it not binding on the minors. It is clearly for their benefit, though the appellant objects to the agreement being enforced against him".

So also Rampini, J., considered only the benefit of the contract⁴ and overlooked the capacity of the manager while he stated in his referring order to the Full Bench⁵ that Basanta Kumar Guha admitted that he had no special authority to execute the agreement for Mr. Garth. Both the learned judges of the Division Bench rightly pointed out that the guardian in Fatima Bibi's case had power to

1 Jolowicz, Historical Introduction to Roman law, 304-305; H.W. Tambiah, Principles of Ceylon Law (Colombo: 1972), 388-89.

2 Mir Sarwarjan v. Fakharuddin Mahomed Chowdhury (1907) 34 Cal 163, 170 (FB).

3 Ibid, 171.

4 Ibid, 169.

5 Ibid, 164.

enter into a contract on the minor's behalf, but they overlooked that the manager in Mir Sarwarjan's case (1907) had not that power.

Although it is inarticulate throughout the judgment Lord Macnaghten seemingly had this difference in mind and it convinced him to disagree with the opinion of the Division Bench that there was no difference between the position and powers of a guardian and those of a manager. There are two portions in the decision in Mir Sarwarjan's case (1911), viz., (i) the manager or guardian was not competent to bind the minor or minor's estate by a contract for the purchase of immovable property; and (ii) the minor was not bound by the contract and therefore there was no mutuality. The first portion is the reproduction of two earlier Privy Council decisions¹, and in the second portion a new principle is established in the light of another Privy Council decision². As a member of the Judicial Committee in Indur Chunder's³ and Mohori Bibee's case⁴ Lord Macnaghten himself was well aware of a guardian's powers and limitations, and a minor's incapacity to contract. A guardian supplements the defective capacity of a minor, but if the guardian himself suffers from a want of competency under the personal law of the minor, the contract entered into by him would be void and would be lacking in mutuality.

1 Waghela Rajsanji v. Shekh Masludin (1887) 14 IA 89 (PC); Indur Chunder Singh v. Radha Kishore Ghose (1892) 19 IA 90 (PC).

2 Mohori Bibee v. Dhurmodas Ghose (1903) 30 IA 114 (PC).

3 (1892) 19 IA 90 (PC).

4 (1903) 30 IA 114 (PC).

Such a contract cannot be specifically enforced in any law¹. Again, a manager in Muslim law has no locus standi, but under the Bengal Regulation 10 of 1793 and Bengal Minors Act 40 of 1858 he could be appointed by courts for minors who were paying revenue direct to the government. None was so appointed in Mir Sarwarjan's case. Therefore the contract entered into by the agent of Mr. Garth was also lacking in mutuality. The mutuality envisaged in Flight v. Bolland² which Norris, J., followed in Fatima Bibi's case is different from that sought in Mir Sarwarjan's case. Mutuality conceived in the latter is the product of contractual capacity of the guardian in relation to the minor, while in the former it is the product of contractual incapacity of the minor himself.

Not altogether surprisingly, the decision in Mir Sarwarjan's case was not properly applied by the courts in India. The doctrine of mutuality as implied by the Privy Council in this case was not understood in its proper perspective. The learned judges³, as will be seen later, could not grasp that where a contract is entered into by a competent guardian mutuality is not wanting.

1 Abdul Haq v. Yehia Khan AIR 1924 Pat 81.

2 (1828) 4 Russ 298; 38 ER 817.

3 Sundaram Chetty, J., in Venkatachalam Pillai v. Sethuram AIR 1933 Mad 322 (FB); Shearer, J., in Rambilas v. Lokenath Chaudhuri AIR 1949 Pat 405; Viswanatha Sastri, J., in Ramalingam v. Babanambal Ammal AIR 1951 Mad 431; Shrivastava, J., in Abdulsattar v. Ismail AIR 1958 MP 373; Dhavan, J., in Bholanath v. Balbhadra Prasad AIR 1964 All 527.

There is a difference between a contract entered into by the minor himself or by an incompetent guardian on his behalf and a contract entered into by a competent guardian. In the former mutuality does not exist because the contract itself is void, while in the latter mutuality is of full force if the contract was for the necessity or benefit of the minor. Mir Sarwarjan's case is a case of the former type, but Lord Macnaghten spoke of the mutuality as it exists in the latter.

4.3. Guardian's purchase under Muslim law and Mir Sarwarjan's case (1911)

The word 'purchase' used in the judgment of Mir Sarwarjan's case has created a confusion in the minds of some judges¹ who believed that the Privy Council decision had totally forbidden the specific performance of a guardian's contract for purchase of immovable property. Such an individualisation again was not intended by their Lordships of the Privy Council. Purchase should be understood as representative of all transactions by a guardian relating to property. The Privy Council decision does not prohibit a competent guardian's alienation or acquisition if it is made for the benefit of the minor. What it states is that an incompetent guardian or manager of a minor's estate is unable

¹ Spencer, J., in Narayana Rao v. Venkatasubba Rao AIR 1920 Mad 423; Chandrasekhara Aiyar, J., in Singara Mudali v. Ibrahim Baig (1946) 2 MLJ 103; Grille, C.J., and Sen, J., in Ramrao v. Suganchandra AIR 1946 Nag 139; Newaskar and Srivastava, JJ., in Abdulsattar v. Ismail AIR 1958 MP 373.

to effect not only a purchase but all sorts of transactions which a competent guardian or manager can validly contract on a minor's behalf. Lord Macnaghten used that particular word in the judgment only because the transaction involved in that case was of a purchase. A Muslim guardian's power is not confined to sale¹ and mortgage² only, it extends to purchase also. That a Muslim guardian can purchase property for minors is plain to us from the Fatwa-i-Alamgiri rendered by N.B.E. Baillie in 1950³, and it must have been before the Privy Council. Earlier Anglo-Mahomedan text-books and British Regulations and Acts also provide that for the benefit of the minor a guardian or a manager or curator as appointed by courts could purchase property. In his Principles and Precedents of Moohummudan Law⁴ Macnaghten observes:

"The former description of guardians (i.e., near guardians, viz., father, grandfather, and their respective executors) answers to the term of curator in the Civil law, and of manager in the Bengal Code of Regulations ... having power over the property of a minor for purposes beneficial to them ...".

At the footnote of page 63 in which the above passage occurs, the writer has referred to Act XIX of 1841. Section 7 of that Act provides:

"... All surplus monies realised by the curator shall be paid into court, and invested in public securities for the benefit of the persons entitled ...".

1 Macnaghten, Moohummudan law, 64 prin. 14.

2 Hurbai v. Hiraji (1896) 20 Bom 116; Imambandi v. Mutsaddi (1917) 23 CWN 50 (PC).

3 Baillie, Moohummudan Law of Sale (London: 1850), 245.

4 Ch. VIII prin. 6, p.63.

Again, section 18 of the Bengal Regulation 10 of 1793 provides:

"If the Collector should think it unnecessary or unadvisable to appropriate such surplus receipts to the improvement of the lands already under the manager's charge, he shall cause the same to be applied by the manager to the purchase of other landed property, or to interest loans on mortgages, or to the purchase of government paper securities, as circumstances may render preferable". [emphasis is mine]

It appears that both the curator and the manager had power to purchase government securities or landed properties with the surplus money of the minor's property if it was advantageous or beneficial to the said owner. Being equivalent to a curator or manager a Muslim guardian has this power of purchase. Wilson says that such a purchase is approved by Muslim tradition¹.

In the Hedaya it is stated²:

"The acts [tesarriif] of an infant are unlawful, because of the defect in his understanding; but the licence or authority of his guardian is a mark of his capacity, whence it is that in virtue thereof an infant is accounted the same as an adult".

The word 'acts' is the English rendering of the Arabic word 'tesarriif' which means all transactions of any kind such as sale, purchase and so forth³. The above quotation shows that the contractual incapacity of a Muslim minor could be removed by the authority of his guardian. If a contract is approved or entered into by the guardian on

1 Anglo-Muhammadian Law (2nd ed., 1903), 215 sec. 125.

2 (Grady's ed.), 524.

3 Hedaya, 524 f.n.

behalf of the minor, the minor would be bound by that contract. Therefore, it is within the competence of the guardian of a Muslim minor to bind the minor by a contract of purchase.

Referring to Radd-ul-Muhtar¹ and Zaidunil Ambani² Abdur Rahman writes in his Institutes of Mussalman Law³:

"Where a father consents to the sale, loan or lease of his child's movable and immovable property, or to any purchase made for the child's benefit, and the child thereby incurs a slight loss, the transaction is valid and cannot be rescinded by the child upon attaining its majority".

In the Fatwa-i-Alamqiri it is stated⁴:

"If the lawful guardian of a minor purchases some property on behalf of the minor, and happens to be the pre-emptor of the same property also, then his right of pre-emption becomes void, but according to few jurists he can exercise the right with the permission of the court".

Syed Ameer Ali observes⁵:

"The executor is liable for any serious inadequacy in the consideration of any property sold or purchased on behalf of the infant".

From the above authorities it is evident that a competent guardian under Muslim law has the authority to purchase property if it is for the benefit of the minor. Besides these textual authorities a Full Bench of the Hyderabad High Court in Amir Ahmmad v. Meer Nizam Ali⁶

1 Vol. 5, 493-495.

2 Vol. 2, 119.

3 (Calcutta: 1907), 236 Art. 423 [My emphasis]

4 Mahomed Ullah ibn S. Jung, The Muslim law of Pre-emption (Tr. of the Fatwa-i-Alamqiri and Fatwa-i-Kazi Khan) (Allahabad: 1931), 6, 255.

5 The law relating to Gifts, Trusts, and Testamentary Dispositions among the Mahommedans (TLL, 1884) (Calcutta: 1885), 571.

6 AIR 1952 Hyd 120 (FB). The case evinces an exhaustive survey of case law.

(V.R. Deshpande, J., dissenting) found that the guardian of a Muslim minor could bind the minor by a 'covenant even when the covenant is for the purchase of immovable property',¹. The question involved in that case was whether a minor who had agreed to purchase property through his guardian could bring a suit for specific performance of the contract. M.S. Ali Khan, J., who delivered the majority judgment after referring to a large number of cases and a few Muslim texts², held that a suit for specific performance could be instituted by a minor where the guardian was competent to bind the minor by his contract and the contract was for the obvious benefit of the minor. Therefore, Muslim law is not against allowing a guardian to purchase property for a minor, on the contrary, it recognises such a purchase if it is for the benefit of the minor and within the competence of the guardian.

What Lord Macnaghten said in Mir Sarwarjan's case is, if put in the affirmative, that a contract of purchase when validly entered into by a competent guardian can be specifically enforced . Negatively, the application of the Privy Council decision can be seen only in cases where the person concerned is not a guardian or manager by any standard of the personal law of the minor. It is not that the particular transaction is forbidden to the guardian as it is one of purchase, it is because the person acting

1 AIR 1952 Hyd 120, 128 (FB).

2 Hamilton, Hedaya Bk. 35 p.534; Fatwa-i-Alamqiri Vol. 1 (1834 ed.), 82; Iban Hajar Al Miski, Allfatawi-i-Kubra Vol. 3, 38. For quotations from these authorities see p. 128 of the judgment.

as guardian is not competent to transact on behalf of the minor. It is not true that guardians of Muslim minors can never purchase immovable property¹. Of course, specific performance being a discretion of courts, in every case a guardian may not be allowed to buy immovable property with the minor's money. If in Hindu law powers of a guardian could be extended to proper cases of purchases², there will be no difference between the Hindu and Muslim law in so far as a competent guardian's power of purchasing properties for a minor is concerned.

The 'bald, unqualified' words of the judgment of Mir Sarwarjan's case tempted the judges of the Indian High Courts to refer to it whenever the question of specific performance of a guardian's contract came before them, and they applied it --- they are doing so in Muslim cases specially even today --- without bothering to enquire into their own unjust appreciation of the Privy Council decision. This blind following³ of the decision in Mir Sarwarjan's

1 Derrett, 'The powers of guardians of non-Muslim minors: a sad misunderstanding' in (1967) 1 MLJ (Jour) 15-20, 19. The reference to Baillie (unspecified) is an error. Baillie, Digest, X, viii (ed. 1865, p.678; ed. 1869, p.689), quoted at Imambandi's case (Fyzee, Cases, 266-7) plainly says that an executor cannot lawfully buy anything for the minor but food and clothing; but this is misleading. This reference in the said article to the acceptance of this pseudo-rule by all textbook-writers reveals an extraordinary state of affairs in legal scholarship in India in the last half-century.

2 Derrett, (1967) 1 MLJ (Jour) 15-20, 19.

3 Derrett, Critique, 186 para 237.

case created hardship to many an innocent minor. So far as the application of the doctrine of mutuality is concerned there is no difference between Hindu and Muslim law. In a guardian's contract mutuality depends on the guardian's competency¹, and this competency is to be determined by the personal law of the minor. On this point there is a difference between the two personal laws in that they are not uniform in their order and selection of guardians². Whenever the courts would apply this Privy Council decision, they should first look into the personal law of the minor and then determine the competency of his guardian. A Division Bench of the Patna High Court in Abdul Hag v. Yehia Khan³ rightly followed the decision and refused to grant specific performance of a contract entered into by the mother of a minor on the ground that a mother in Muslim law is not a competent guardian to make a contract on her minor son's behalf. But it was not properly applied by the Madhya Pradesh High Court in Abdulsattar v. Ismail⁴ where Newaskar and Shrivastava, JJ., did not consider the competency of the father who was acting as guardian of his minor children.

The inconsiderate application of the Privy Council decision to cases of Hindu minors evolved the following

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- 1 Derrett, (1967) 1 MLJ (Jour), 15-20, 18. A similar view is expressed when the writer made the following remarks on Mir Sarwarjan's case: "The minor was not bound because the act was void under his personal law. As the act did not bind him the agreement lacked mutuality and specific performance could not be decreed against either party".
 - 2 For example, in Muslim law the mother is not considered a guardian of the minor's property, while in Hindu law she is and she comes after the father.
 - 3 AIR 1924 Pat 81.
 - 4 AIR 1958 MP 373.

rules: First, where the property of a guardian's contract was the minor's separate property and the contract was to sell such property, the contract could not be specifically enforced against the minor when he attained majority¹. So also a guardian's contract for the purchase of property could not be enforced by the minor². Secondly, where the property involved belonged to a joint Hindu family of which the minor was a member and a contract was entered into by the manager on behalf of the joint family, the contract could be specifically enforced even as regards the minor's share, if it was for the purpose of necessity or benefit of the family³. Thirdly, where the property was in common tenancy with another, a contract by the guardian could be specifically enforced if one of the co-owners was a major and both the minor and his co-owners were intended to be bound by the contract. But where such a contract was divisible and could be converted into independent contracts, specific performance could not be enforced as against the minor's part of the contract⁴.

1 Nageswara Rao v. Mandawa AIR 1928 Mad 830; Ramakrishna Reddier v. Chidambara Swamigal AIR 1928 Mad 407; Raghu-nathan v. Revuthakanni (1928) 2 MLJ 277; Krishna Chandra v. Seth Rishabha AIR 1939 Nag 265; Swarath Ram v. Ram Ballabh AIR 1925 All 295; Srinath v. Jatindra AIR 1926 Cal 445; Rambilas Singh v. Lokenath AIR 1949 Pat 405; Hari Mohan v. Sew Narayan AIR 1949 Assam 57; Gopalkrishna v. Tukaram AIR 1956 Bom 566; Bholanath v. Balbhadra Prasad AIR 1964 All 527.

2 Narayana Rao v. Venkatasubba Rao AIR 1920 Mad 423; Venkata-chalam Pillai v. Sethuram AIR 1933 Mad 322 (FB); Singara Mudali v. Ibrahim Baig (1946) 2 MLJ 103; Ram Rao v. Sugan-chandra AIR 1946 Nag 139; Ramchandra v. Manikchand AIR 1968 MP 150.

3 Haricharan Kuar v. Kaula Rai AIR 1917 Pat 478 (FB); Ramajo-gaya v. Jagannadham AIR 1919 Mad 641 (FB); Thakur Hargovind v. Mehtab Singh AIR 1922 Nag 193; Mt. Dhapo v. Ramchandra AIR 1934 All 1019; Brahamdeo v. Haro Singh AIR 1935 Pat 237; Sudarsana Rao v Dalayya AIR 1943 Mad 487.

4 Nripendra Chandra v. Ekherali AIR 1930 Cal 457.

It is argued that the decision in Mir Sarwarjan's case has been greatly 'shaken'¹ or 'overruled'² by a subsequent Privy Council decision in Subrahmanyam v. Subba Rao³. Is it actually so? We have seen in the previous chapter⁴ that in this case their Lordships of the Privy Council found the minor as the 'transferor' in the sense in which the word is used in section 53A of the Transfer of Property Act of 1882, and thus they enforced the contract against him, although it was entered into on the minor's behalf by his mother. The two Privy Council cases are different from one another. Mir Sarwarjan's case was dealing with an equitable relief, while Subrahmanyam's case was dealing with a statutory remedy. In the latter their Lordships applied the hypothetical question: "If the mother and guardian had taken no part at all in the transaction, the respondent could not have entered into a valid contract to sell the land in suit to the appellants, but ... that such a contract could and did come into existence in the present case, and the question for decision is --- was the person who contracted, within the meaning of section 53A, the respondent or his mother?"

1 Ramalingam v. Bavanambal Ammal AIR 1951 Mad 431; Abdulsattar v. Ismail AIR 1958 MP 373 per Srivastava, J.

2 Suryaprakasam v. Gangaraju AIR 1956 AP 33 per Subba Rao, C.J.; Vijaykumar v. Gokulchand (1964) 68 Bom LR 891; Popat Namdeo v. Jagu Pandu (1968) 70 Bom LR 456.

3 AIR 1948 PC 95.

4 See supra, 230-33.

And they found the minor as 'transfror'. In fact specific performance in the sense of a guardian's contract was not decreed in that case; and for this reason the earlier Privy Council decision in Mir Sarwarjan's case was not referred to in this case. Hindu law consideration in Subrahmanyam's case was only obiter; their Lordships merely restated earlier Privy Council decisions¹ in that respect. Patanjali Sastri, J., who delivered the judgment of the Division Bench of the Madras High Court² in that case rejected the appellant's claim under section 53A of the Transfer of Property Act, and also it is mentioned in the order of leave of appeal that for proper interpretation of the said section appeal was allowed to be made to the Privy Council. So to rely on Subrahmanyam's case means to seek the aid of statutory law and not the relief of equity. As we have seen earlier section 53A of the Transfer of Property Act can be availed of only as a defence and the transferee must be in possession of the property under the contract. The decision in Mir Sarwarjan's case is neither shaken nor overruled by the decision in Subrahmanyam's case; on the contrary, both are stating the same thing from different standpoints. In Mir Sarwarjan's case it is established that a guardian cannot enter into a valid contract relating to the acquisition for or alienation of

1 Hunoomanpersaud's case (1856) 6 MIA 393; Mohori Bibee's case (1903) 30 IA 114 (PC).

2 Subrahmanyam v. Subba Rao AIR 1944 Mad 337.

a minor's property unless he is competent under the personal law of the minor to do so; while in Subrahmanyam's case it is held that a minor cannot be described as a 'transferor' under section 53A of the Transfer of Property Act, and would not be bound by a guardian's contract, unless the contract is one which is within the competence of the guardian according to the minor's personal law and is also for the benefit of the minor. The decision in Mir Sarwarjan's case is not inconsistent with the decision in Hunoomanpersaud's case. In the latter the guardian's powers were determined in relation to the minor's economic and moral need and benefit, while in the former the guardian's competency or capacity was judged in relation to his social and legal standing towards the minor.

Derrett rightly points out¹ that the decision in Mir Sarwarjan's case is not overruled; but it is not necessary to call it a 'Muslim case' because once the principle of competency is accepted, the competency of guardians of Hindu minors would be decided according to the decision in Hunoomanpersaud's case and those of Muslim minors according to Muslim law. In recent cases² involving the specific performance of a guardian's contract, where

1 Derrett, (1967) 1 MLJ 15-20, 20.

2 Ramalingam v. Babanambal Ammal AIR 1951 Mad 431; Suryaprasam v. Gangaraju AIR 1956 AP 33 (FB); Sitarama Rao v. Venkatarama Reddiar (1956) 1 MLJ 5; Vijaykumar v. Gokulchand (1966) 68 Bom LR 891; Popat Namdeo v. Jagu Pandu (1968) 70 Bom LR 456; Hiralal Dayaram v. Bhikari Sampat (1970) 73 Bom LR 481; Lingo Reddy v. Ramchandrapa (1971) Mys LJ 159; Radheshyam v. Kiran Bala AIR 1971 Cal 341; Muhammad Mursaleen v. Noor Muhammad PLD 1968 Kar 163. See also Derrett, 'Contracts by guardians of Hindu minors' in (1971) 73 Bom LR (Jour) 79-80.

decisions are taken properly considering the competency of guardians according to the personal laws of the minors concerned, those decisions are not against the decision in Mir Sarwarjan's case. But wherever it is followed in the sense as it used to be previously without considering the competency of the guardian, it is, in fact, disagreeing with the Privy Council decision. In Ramchandra v. Manikchand¹ where a mother acting as guardian of her minor children entered into an agreement for purchasing a house, and on the refusal by the vendor to execute the sale deed instituted a suit for the specific performance of the contract, Bhave, J., sitting with Tare, J., held, following Mir Sarwarjan's case, that it was not within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the sale or purchase of immovable property. The decision cannot be said to have been right, since the mother of a Hindu minor is competent to enter into a contract on her minor child's behalf and the contract could be specifically enforced if it was for the benefit of the minor. In reaching to this decision the learned judges also said that after the passing of the HMGA of 1956 the authority of a natural guardian to transfer the minor's property had been taken away, and the guardian could not effect a transfer without the prior permission of the court. Therefore, a contract entered into either for sale or for purchase of immovable property could not

¹ AIR 1968 MP 150, 155.

be binding on the minor and consequently neither the minor nor the other party to the contract could specifically enforce it. It is to be remembered that the word 'purchase' is not mentioned in the prohibitive section 8(2) of the HMGA, while section 8(1) allows a guardian to do all acts which are necessary or reasonable and proper for the benefit of the minor. In Than Singh v. Barela¹ a Division Bench of the Madhya Pradesh High Court held that a guardian was not required to obtain permission of court for entering into a contract for purchase on the minor's behalf under section 8 of the HMGA.

If the decision in Mir Sarwarjan's case is understood in its proper perspective, there is no need to look for its justification in the HMGA² or to push it out of the same Act³. Salil Kumar, J., in Radheshyam v. Kiran Bala⁴ took an opportunity to assess the doctrine of mutuality in the light of the Specific Relief Act (Act 47) of 1963. Section 20(4) of the Specific Relief Act provides that merely on the ground of absence of mutuality specific performance of a contract should not be refused, and on the basis of this section the learned judge granted specific performance of an agreement for sale. Oza, J.,

1 AIR 1974 MP 24.

2 Ramchanrda v. Manikchand AIR 1968 MP 150, 155. Bhawe, J., observed that after the passing of the HMGA the dictum laid down by Lord Macnaghten in Mir Sarwarjan's case would be applicable with all force to all the contracts of the natural guardians, whether for sale or for purchase of property, if no permission of the court had been obtained.

3 Lingo Reddy v. Ramchandrappa (1971) 1 Mys LJ 159.

4 AIR 1971 Cal 341.

sitting with Murab, J., in Than Singh's case pointed out that the Indian Law Commission in its report on the Specific Relief Act had thrown out the doctrine of mutuality as established by the decision in Mir Sarwarjan's case, and that section 20(4) incorporated that recommendation. J.L. Kapur who edited Pollock and Mulla's Indian Contract and Specific Relief Acts¹ said that the doctrine of mutuality had been 'already discarded' in section 12 of the Specific Relief Act. Has the doctrine of mutuality really been thrown out or only the untoward gloss put upon it by judicial decisions? Possibly it is the latter. By advocating the dropping of mutuality surely the Law Commissioners are not allowing a minor without a guardian to enter into a valid contract or a stranger to bind a minor with his contract! There must be a valid contract, as that is the pre-requisite of the specific enforcement of it. In Than Singh's case Oza, J., observed²:

"If there are other circumstances which could be considered for refusal of specific performance along with them this doctrine also could be considered. In our view ... merely on the ground of want of mutuality a suit for specific performance cannot be thrown out".

5. Testamentary guardianship under Hindu law

5.1. Testamentary guardians

Testamentary disposition was unknown to the Hindus in ancient time³; therefore the sastric Hindu law contains

1 (9th ed., 1972), 878.

2 AIR 1974 MP 24, 26.

3 Strange, Hindu law Vol. 1 (1830 ed.), 254; Colebrooke, Digest Vol. 2 (1801 ed.) 516 f.n.; Maine, Ancient law [London: 10th ed. (cheap ed.), 1905], 171; West and Buhler, Hindu Law (London: 4th ed., 1919), 209.

no provision for the appointment of a testamentary guardian. However, the inherent power of the father to control and guide the conduct and disposition of his sons led to the recognition of his testamentary power to appoint guardians for his sons from the earliest time after the reception of English law through the equitable principles of justice, equity and good conscience¹ and with the support of legislature² and the courts³. Under Anglo-Hindu law an adult father⁴ can, by word⁵ or writing, nominate a guardian of the person of his children, and of their separate property in their hands, such nomination to take effect after his death and not before⁶. He is unrestricted in his choice of such guardian, and may even exclude the mother from the guardianship⁷. He can appoint a testamentary guardian both as regards the person and

1 Derrett, Introduction, 443 para 700.

2 Bengal Regulation 5 of 1799, section 2; Bengal Reg. 1 of 1800 (repealed by Act 40 of 1858); Madras Reg. 3 of 1802, section 16; Madras Reg. 5 of 1829, sections 3 and 4; Bengal Minors Act 40 of 1858, section 7; Bombay Minors Act 20 of 1864, section 8; Hindu Widows' Remarriage Act (Act 15) of 1856, section 3.

3 Strange, Hindu law (1830 ed.) Vol. 1, 255; the same Vol. 2, 419; West and Buhler, Hindu law (4th ed., 1919), 618; Doe dem Munoololl v. Gopee Dutt (1786) Morton Rep. 290; 1 ID 174 (OS); Sreenarain v. Bhya Jha (1812) 2 SDA (Beng) 29, 37 (NE); Nana Nurain Rao v. Huree Punth Bhao (1862) 9 MIA 96, 98; Baboo Beer Pertab v. Maharajah Rajender Pertab (1867) 12 MIA 1, 38; Raj Lukhee Dabea v. Gokool Chunder Chowdhry (1869) 13 MIA 209, 222-23; Bhaqvan Dullabh v. Kala Shankar (1877) 1 Bom 641; Haribhat v. Damodarbhat (1878) 3 Bom 171.

4 Trevelyan, Minors, 62, f.n. 1.

5 Before 1927 the Hindus could make oral wills except certain cases; however, from January 1, 1927 all wills made by them require to be in writing. See Indian Succession Act of 1925 sections 57, 63; also see Derrett, Introduction, 445-446 para 704.

6 Budhilal v. Morarji (1907) 31 Bom 413; Deb Nand v. Anandmani (1920) 43 All 213; Konthalathammal v. Thangasamy (1923) 46 Mad 873.

7 Soobh Doorga Lal Jha v. Rajah Neelanund Singh (1867) 7 WR 74 (CR); Trevelyan, Minors, 62.

and property of his minor daughter. On the marriage of the daughter during minority, the husband becomes in law the guardian of her person but, unless there is an express provision in the will, the guardian appointed by the father continues to be the guardian so far as the property is concerned¹. The right of the father to appoint by will a guardian for his child is not lost by his becoming a Christian². A Hindu mother although she is a natural guardian had no authority to appoint a guardian for her son by will. But the court might take her wishes into consideration in appointing a guardian after her death³.

There was a conflict of opinion whether a Hindu father could appoint by will a guardian of the ancestral property in which his minor son had a right by birth. The earlier view was that the father could make such an appointment on the ground of convenience. But in later cases it has been held that the father has no such power. In Chidambara Pillai v. Rangasami Naicker⁴ a Full Bench of the Madras High Court held that the only adult coparcener of a joint family consisting of himself and his minor coparceners was not competent to appoint a testamentary guardian to the coparcenary property of the minor

1 Rajarajeswari v. Sankaranarayana (1948) Mad 351.

2 Dr. Albrecht v. Bathee Jellamma (1922) 22 MLJ 247.

3 Venkayya Garu v. Venkata Narasimhulu (1898) 21 Mad 401.

4 (1918) 41 Mad 561 (FB).

coparceners. Sitting in a Division Bench¹ of the same High Court Devadoss, J., observed that the decision in Chidambara Pillai's case could govern only cases where a testamentary guardian was sought to be imposed upon the coparceners of a joint Hindu family and it could not be extended to take away the right of a father to appoint a guardian for the person of his minor son.

A Full Bench of the Bombay High Court in Brijbhukandas v. Ghashiram² followed Chidambara Pillai's case and held that it was not competent for the only adult coparcener of a joint Hindu family to appoint by will or otherwise a trustee, guardian or manager of the coparcenary property of a minor coparcener during his minority. The reasoning behind the latter view is that the father who is not capable of making a disposition of the ancestral property in his hands, cannot be in a position to control that property after his death. Where, however, the father left a will by which he authorised his widow to adopt a certain boy named therein, and directed that after the adoption the minor's natural guardian should be his guardian till he came of age, it was held that the appointment was valid as it extended to property over which the testator had complete power of disposition at the time of death³. But more recently in Rajalakshmi v. Ramachandran⁴ relying on

1 Konthalathammal v. Thangasamy (1923) 46 Mad 873, 893.

2 (1935) 59 Bom 316 (FB).

3 Jagannath Rao v. Ramayamma (1921) 44 Mad 189; Ramanathan v. Palaniappa (1939) Mad 776, 784.

4 (1966) 2 MLJ 420, 424.

Konthalathammal's case it was observed that a father had not the right to appoint a guardian by will for his minor son by virtue of the power of disposition of his separate or self-acquired property, for it was a well-known principle of law that a testator could not appoint a guardian for a minor legatee only by reason of the disposition in his favour, but a testator could appoint trustees to hold property for a legatee and that would not depend upon the legatee being a minor. On this analogy it was held that the mere fact that a person gifted property to a minor would not entitle that person because of that gift only to appoint a guardian for the minor in respect of that property, though it would be open to the donor to provide for the management of the gifted property by resorting to a trust. Moreover, while a lawful guardian was alive the stranger donor could not by an instrument appoint another person as the guardian of the property for the reason only that the property was gifted by him, because the powers of a natural or legal guardian either of the person or property of a minor could not be taken away by a third party without an order of the court, even if the guardian was willing.

Section 6 of the GWA saved the power conferred by the personal law of a minor to appoint a testamentary guardian. The section runs as follows:

"In the case of a minor, nothing in this Act shall be construed to take away or derogate from any power to appoint a guardian of his person or property, or both, which is valid by the law to which the minor is subject".

The appointment of a person as a testamentary guardian is a matter of personal preference and trust, and his rights do not survive to his legal representative¹. Whenever a dispute arises as to a testamentary appointment in which the validity of the will itself is challenged, the court must accept the determination of any competent court on the question. Should the question not have been determined, then the court may itself determine it in guardianship proceedings, but its decision will not operate as res judicata in a subsequent petition by the guardian for the probate of the will².

5.2. Alienation by testamentary guardians

Section 28 of the GWA deals with powers of a testamentary guardian to alienate the immovable property of his minor ward. In the first instance the powers are subject to restrictions which may be imposed by the instrument appointing him a guardian. In the absence of any restrictions in the deed of appointment it would seem that the powers of a testamentary guardian are similar to those of a natural guardian³. When a testamentary guardian assumes the position of a certificated guardian by being declared a guardian by the court under section 7 of the GWA, his powers of disposal become subject to the orders that the court may make in that behalf.

1 Gangabai v. Khashabai (1899) 23 Bom 719.

2 Chinnasami v. Hariharabadra (1893) 16 Mad 380.

3 Jagannath Rao v. Ramayamma (1921) 44 Mad 189; Ramanathan v. Palaniappa AIR 1939 Mad 531.

Section 28 provides as follows:

"Where a guardian has been appointed by will or other instrument, his power to mortgage or charge, or transfer by sale, gift exchange or otherwise, immovable property belonging to his ward is subject to any restriction which may be imposed by the instrument, unless he has under this Act been declared guardian and the court which made the declaration permits him by an order in writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order".

Where the guardian of a minor appointed under the will of the minor's father continues the business started by the father properly as per directions in the will and incurs debt on behalf of the minor in the course of carrying on such business, the creditor is entitled to have recourse against the assets of the business in addition to proceedings against the guardian personally according to the principle of subrogation. This right of indemnity of the guardian is, however, dependent upon the fact that on taking accounts there is nothing due from him to the estate in respect of his transactions¹. If a person was appointed by a Hindu testator as executor of his will for the purpose of managing his estate and carrying on his business, the position of the executor would be that of a validly appointed testamentary guardian of a son who was adopted after the death of the testator, and his powers of management would be derived not only from the will but also from the principles of Hindu law

¹ Perumal v. Ramasubramania AIR 1938 Mad 265.

recognised in Hunoomanpersaud's case. Such a guardian could under Hindu law bind the minor's estate by a contract for simple debt¹ if the guardian would make himself personally liable under the contract². The creditor could not have a direct recourse against the minor's property³.

5.3. Testamentary guardianship under the HMGA

As seen above the right to appoint a testamentary guardian according to the personal law of minors was left unimpaired by section 6 of the GWA, and as a result the testamentary guardians, so far as their appointment and powers were concerned, were governed by the personal law of the minors. The HMGA has intended to amend and codify the Hindu law in this respect, and in section 9 it has introduced elaborate provisions for this purpose⁴. Section 9 runs as follows:

- "(1) A Hindu father entitled to act as the natural guardian of his minor legitimate children may, by will, appoint a guardian for any of them in respect of the minor's property (other than the undivided interest referred to in section 12) or in respect of both.
- (2) An appointment made under sub-section (1) shall have no effect if the father predeceases the mother, but shall revive if the mother dies without appointing, by will, any person as guardian.

1 Ramanathan v. Palaniappa AIR 1939 Mad 531.

2 Sriramulu v. Pundarikakshayya AIR 1949 FC 218.

3 Suryaprakasam v. Ganqaraju AIR 1956 AP 33, 45 (FB).

4 Though S.V. Gupte [see supra, 319 f.n.2] wrote in 1970 he had singularly little to say about section 9 of the HMGA, except to point out the conflict with section 28 of the GWA. See Gupte, op. cit., 414.

- (3) A Hindu widow entitled to act as the natural guardian of her minor legitimate children, and a Hindu mother entitled to act as the natural guardian of her minor legitimate children by reason of the fact that the father has become disentitled to act as such, may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in section 12) or in respect of both.
- (4) A Hindu mother entitled to act as the natural guardian of her minor illegitimate children may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property or in respect of both.
- (5) The guardian so appointed by will has the right to act as the minor's guardian after the death of the minor's father or mother, as the case may be, and to exercise all the rights of a natural guardian under this Act to such extent and subject to such restrictions, if any, as are specified in this Act and in the will.
- (6) The right of the guardian so appointed by will shall, where the minor is a girl, cease on her marriage".

The HMGA has removed the mother's incapacity to appoint a testamentary guardian of her minor children in the absence of their father or his becoming disentitled to act as such. It provides that in order to be able to exercise the right of appointing a testamentary guardian for his legitimate children, the father must be entitled to act as their natural guardian; and that if he has lost his right to act as a natural guardian either by ceasing to be a Hindu or by becoming a hermit or an ascetic, he can have no power in this behalf. A testamentary guardian

may be appointed in respect of the minor's person or his separate property or of both, but not in respect of an undivided interest of the minor in joint family property which is under the management of an adult member of the family. Where the father predeceases the mother, the appointment made by him will lapse, but it should revive if the mother dies without making any appointment.

Although a preferential right of appointing a testamentary guardian is given to the father, he cannot exclude the mother from acting as a natural guardian after him.

Again, the mother who survives the father has the right to make a testamentary appointment in supersession of the testamentary guardian appointed by the father. Even during the lifetime of the father, the mother can appoint a guardian by will, if the father has rendered himself incapable of acting as the natural guardian of his minor legitimate children because he can no more exercise his right. Like the father's, her right to appoint a testamentary guardian is also subject to two conditions, viz., that she is entitled to act as the natural guardian of her minor legitimage children, and that the appointment does not extend to the undivided interest of the minors in the joint family property. As the mother has the preferential right of guardianship in the case of her illegitimate children, she is given the right to appoint a guardian for them by will. It may be observed that the father has not been given any right in the matter of

appointment to take effect after the death of the mother although under section 6(b) of the HMGA he is entitled to act as the natural guardian of his illegitimate children after her. The appointment of a testamentary guardian comes into effect after the death of the testator except where it is made by the father who is survived by the mother. The testamentary guardian has all the rights of a natural guardian under the HMGA and he is subject to all the restrictions to which a natural guardian is subject. He cannot have powers in excess of those given or which are in conflict with those conferred by the HMGA. Likewise a testator cannot remove the restrictions imposed on his powers by the HMGA; on the contrary, the testator can put additional restrictions on his powers. As seen earlier, under the GWA a testamentary guardian's powers are conferred by the will, and in the absence of of such powers his powers are similar to those of a natural guardian. Section 28 of the GWA provides that the powers of a testamentary guardian to mortgage, sell, gift, exchange or otherwise transfer immovable property of the minor are subject to those restrictions only which are imposed by the will, and in exercising these powers he is not required to obtain the previous permission of the court. Under the HMGA the testamentary guardian can exercise all the powers of a natural guardian to such extent and subject to such restrictions as are specified in section 8 of the Act and the will. But under section 8

a natural guardian cannot alienate the minor's property without the permission of the court. Therefore the testamentary guardian cannot transfer without such permission. Thus to that extent there is conflict¹ between the GWA and the HMGA. However, in view of section 5 of the HMGA, the HMGA will prevail, and the testamentary guardian to whom the HMGA applies cannot alienate minor's immovable property without the prior permission of the court even if there is no restriction in the will or the will permits him to do so. In this consideration the testamentary guardians of Hindu minors of Pakistan and Bangladesh enjoy more liberty than their recent counterparts in India.

The right of a testamentary guardian to control the person or property or both of a minor girl terminates on her marriage; and it then devolves on her husband. The right of the father or mother to appoint a testamentary guardian for his or her child under a marriage declared a nullity under section 11 or avoided by a decree of nullity under section 12 of the Hindu Marriage Act (Act 25) of 1955 is the same as the power of the father or mother to appoint a testamentary guardian in respect of his or her legitimate child.

¹ Gupte, op cit, 414.

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C H A P T E R I V

ALIENATION BY GUARDIANS UNDER MUSLIM LAW

1. Alienation by natural guardians

1.1. Who are natural guardians under Muslim law?

As said in chapter 1, the legal incapacity of minors to act was recognised since long and both Hindu and Muslim law-givers provided for the care and protection of their person and property by adult persons capable of looking after their welfare and interests in property. These adult persons are entitled by the respective personal laws of the minors to act as guardians without any previous judicial sanction so long as they are not deprived of their right to act as such by an order of a court of competent jurisdiction¹. These adult persons are known as 'natural guardians'. The natural guardians are like any other guardians, prima facie entitled to the custody of their minor wards. But in Muslim law this right is postponed for the time being in favour of other persons. As seen in chapter 1 the natural guardians under Muslim law being all males, they are not entitled to the minors' custody until the minors attain a particular age. Muslim law recognises a different class of persons, viz., the females², as having a preferential right in that behalf. But that does

1 Trevelyan, Minors, 151.

2 For the order of preference among the females see supra, 41.

not deprive the natural guardians of their right of guardianship.

Under Muslim law the following persons are entitled in the order mentioned below to be the guardians of a minor's property¹:

- (1) the father;
- (2) the executor appointed by the father's will;
- (3) the father's father;
- (4) the executor appointed by the will of the father's father.

In default of these persons the duty of appointing a guardian of the minor's property devolves on the kazi or judge, as the representative of the ruler².

All the above four persons are called legal guardians. It appears therefore that the only relations who could be the natural guardians of a minor's property are (1) the father, and (2) the father's father; and they are the only persons who are entitled to appoint a guardian of the property of a minor by will. No other relation is entitled to the guardianship of a minor's property as of right, or no other relation has any power to appoint by will a guardian of the property of the minor, not even the mother.

1 Baillie, Digest Vol. 1, 689; Macnaghten, Moohummudan law, 62 prin. 5; Imambandi v. Mutsaddi (1918) 45 IA 73; 23 CWN 50; Ara Begum v. Deputy Commissioner of Gonda AIR 1941 Oudh 529; Kharag Narain v. Hamida Khatoon (1955) 34 Pat 709; Mohd. Zafir v. Amiruddin AIR 1963 Pat 108; Abdullah Khan v. Nisar Mohd. Khan PLD 1965 SC 690; Gulam Ghouse v. Kamisul AIR 1971 SC 2184.

2 Baillie, Digest Vol. 1, 689; Macnaghten, Moohummudan law, 304.

Unlike Hindu law, the widowed mother of a Muslim minor is not the legal guardian of the property of her minor children, and cannot do any act relating to their property so as to bind them, and a sale or mortgage by her cannot as such bind the minor children. Though she may be a co-heir with her minor children in respect of the property dealt with by her, Muslim law does not constitute the senior co-heir, like Hindu law, the managing coparcener entitled to administer and manage the estate until partition .

Benson and Bhashyam Ayyangar, JJ., in Pathummabi v. Vittil Ummachabi¹ held that alienations by such a widow could not be upheld. A similar view was taken by the Bombay High Court in Bhikaji Ramchandra v. Ajgarally Sarafally². In that case the court observed that where a Muslim widow after obtaining the leave of the executing court under Order 32 Rule 7 of the Civil Procedure Code (Act 5) of 1908, executed a sale deed in favour of the mortgagee who had obtained a decree for the sale of the land which was mortgaged by her deceased husband, on behalf of herself and as guardian ad litem of her minor daughter, the sale deed was void in so far as it affected the share of the minor daughter in the land, and the purchaser acquired no title to it. The leave granted by the executing court was not sufficient to clothe the widow with power to sell the lands in the absence

1 (1902) 26 Mad 734. Similar views are also expressed in Maimunnissa Bibi v. Abdul Jabbar AIR 1966 Mad 468; Jaina Beevi v. Govindaswami AIR 1967 Mad 369.

2 AIR 1946 Bom 57. This case was followed recently by the Gujrat High Court in Parshotandas v. Bai Dhabu AIR 1973 Guj 88, 90.

of her appointment as the legal or certificated guardian of her minor daughter. Their Lordships of the Privy Council held in Imamabandi v. Mutsaddi¹ that a Muslim mother had no power to deal with her minor child's immovable property.

Under Muslim law the de facto possession over the minor heirs' shares cannot make a major heir the guardian of their property. That entitlement is to be settled with reference to the principles of Muslim law relating to guardianship of property. In Parshotamdas v. Bai Dhabu² a lady lawyer for the appellants wanted the Gujrat High Court to accept her arguments aimed at justifying the sale by a mother of the whole property left by her deceased husband including the shares therein of her two minor children, she being in possession of the whole property. She solicited a decision to the effect that since the sale was effected for the purpose of paying off the dues under a decree obtained against all the heirs, including the minors, it should be binding on the two minor children as well. The court applied the principles of Muslim law and laid down that one of the Muslim co-heirs who was not a guardian of the other minor co-heirs' property could not lawfully alienate the latter's shares for any purpose whatsoever.

1.2. Alienation of minors' property by natural guardians

In respect of the powers of alienation of a natural guardian Muslim law draws a distinction between movable

1 (1918) 23 CWN 50 (PC).

2 AIR 1973 Guj 88, 90.

and immovable property. If the property is movable he may sell or purchase it on account of the minor either for an equivalent or at such a price as to occasion an 'inconsiderable' loss. Even under unavoidable circumstances the consideration of loss would not deter him from effecting a transaction, since that would shut the door to the 'business of purchase and sale'¹. But where the inadequacy of consideration is due to any fraud or culpable negligence on the part of the guardian, the minor may avoid any transaction entered into by the guardian on his behalf and make him liable for its consequences. But if the transaction has been entered into bona fide with due care and attention, the guardian would not be held responsible for any untoward consequences which may have resulted from it contrary to his expectation. Indeed the natural guardian may enter into any transaction with regard to the minor's personal property on behalf of and for the benefit of the minor and such transaction will be valid and binding on the minor provided there is no unfair dealing or fraud². If the property is immovable and if the deceased has left neither debts nor legacies his dealings with it would be subjected to strict conditions³. As reason for such restrictions it

1 Hedaya, 702.

2 Macnaghten, Moohummudan law, 64 prin. 15; Trevelyan, Minors, 165; Mussamut Syedun v. Syud Velayet Ali Khan (1872) 17 WR 239 (CR).

3 Baillie, Digest Vol. 1, 687.

is stated in the Hedaya¹:

"The ground of this (difference in the power of dealing with the two kinds of property) is, that the sale of movable property is a species of conservation, as articles of that description are liable to decay, and the price is much more easily preserved than the article itself. With respect, on the contrary, to immovable property, it is in a state of conservation in its own nature, whence it is unlawful to sell it, --- unless, however, it be evident that it will otherwise perish or be lost, in which case the sale of it is allowed".

1.2.1. Alienation of movable property

Their Lordships of the Privy Council observed in Imambandi v. Mutsaddi² that the legal guardian of a minor had the power to sell or pledge the goods and chattels of a minor for the latter's imperative necessities, such as food, clothing and nursing. The Supreme Court of Pakistan held in Central Exchange Bank Ltd. v. Zaitoon Begum³ that a father could pledge his minor children's goods for his own debts. According to the Hedaya the father may pledge the movable property of his minor child to himself for a debt due from the child to himself, or he may pledge it to another on account of a debt of his own remaining, however, always liable for the value of the goods to the child⁴. Syed Ameer Ali has stated⁵ that 'other jurists seem to

1 702. This passage has been approvingly quoted by their Lordships of the Privy Council in Imambandi v. Mutsaddi (1918) 23 CWN 50, 58.

2 (1918) 23 CWN 50.

3 PLD 1968 SC 83, 93.

4 Hedaya, 639.

5 Mahommedan law Vol. 2 (Calcutta: 4th ed., 1917), 615.

disagree with the author of the Hedaya in this latter view', and he further says that according to them the father stands in the same position as any other guardian, that is, it is not lawful either for him or for a tutor to pay off his own personal debts with the goods of the minor, or to pledge them on account of his debts¹.

S.A. Rahman, J., in Central Exchange Bank's case has questioned this view of Syed Ameer Ali, and quoting the relevant passage from the original text of the Durr-ul-Mukhtar² he translated it as follows³:

"And it is lawful for the father to pledge his minor son's slave for his own debt, for he has the power of giving on amanat (deposit in trust). If the goods are destroyed, in the case of a deposit in trust, there is no liability on the person in possession whereas in the case of a pledge there will be liability and so this (pledge) is preferable. The case of the executor is similar. Abu Yousaf has said that they (the father and the executor) do not own the property (and so they have no right). And Tumurtashi says, the executor will be liable for the full price, for the father is entitled to benefit from the goods of the minor but not the executor. But in the Zakhira and other books, they are placed on the same footing".

It is stated in the Fatwa-i-Alamgiri⁴:

"If the father has pledged his minor child's property for such debt as he has incurred either for himself or for his minor child, then it is lawful".

1 The writer has referred to Durr-ul-Mukhtar, 846, and Jam'a-ush-Shittat as the authorities in the foot note of his book Mahommedan law Vol. 2, (4th ed.), 615.

2 Vol. 2, 270 (as quoted in the judgment).

3 PLD 1968 SC 83, 94.

4 As quoted in the judgment p. 93.

The learned judge of the Pakistan Supreme Court after referring to a wide range of authorities¹ observed²:

"A survey of the authorities, therefore, reveals preponderance of opinion in favour of the father's power to pledge his minor son's goods for his own debt. ... It follows that, in respect of the fixed deposit receipts, standing in the name of the minor daughters, they cannot assimilate themselves to the position of sureties. The father himself had pledged these receipts and he could do so in his own right. The remedy of these minors would seem to lie in reimbursing themselves out of the estate left by their father, if necessary".

1.2.2. Alienation of immovable property

Under Muslim law the natural guardian of the property of a minor has no absolute power to alienate the minor's immovable property except in the following cases³, viz.,-

- (1) where he can obtain double its value;
- (2) Where the minor has no other property and the sale is necessary for his maintenance;
- (3) where there are debts of the deceased, but no means of paying them except by the sale;

1 Fatwa-i-Alamgiri [Tr. by Maulana Amir Ali (1932 ed.), 222]; Durr-ul-Mukhtar [Annotated by Syed Muhammad Abdul Ahad (Delhi: 1916)]; Rudd-ul-Muhtar [A commentary on the Durr-ul-Mukhtar by Allama Ibn-i-Abidin (Delhi: 1238 Hijra)]; Bada-i-As-Sanai-Fi-Tartib-ish-Sharai by Imam Alaaddin Abi Bakr bin Masud Alkasani (Egypt: 578 Hijra); Ain-ul-Hedaya by Maulana Amir Ali (Lucknow: 1896); Hamilton, Hedaya (Grady's ed., 1870), 638; Wilson, Digest of Anglo-Muhamadan law (1895 ed.), 123; S.C. Sircar, Tagore Law Lectures--1873, 482 Art. 560; Syed Ameer ali, Mahommedan law Vol. 2 (1965 ed.), 503; Tyabji, Muslim law (3rd ed.), 300; Macnaghten, Moohummudan law (1897 ed.), 63; Abdur Rahim, Muhamadan Jurisprudence (1958 ed.), 345; Mulla, Muslim law (13th ed.) para 366; Saxena, Muhammadan law (1955 ed.), 328.

2 PLD 1968 SC 83, 95-96.

3 Baillie, Digest Vol. 1, 687-688; Macnaghten, Moohummudan law, 64 prin. 14; Mulla, Muslim law (17 th ed., 1972), 340 para 362; Eishu Chugani v. Randal Agarwala AIR 1973 Cal 64; Janab Haji Abdul Hamid v. Samsunnissa Begum (1967) 2 MLJ 195.

- (4) where there are lagacies to be paid, and no other means of paying them;
- (5) where the expenses exceed the income of the property;
- (6) where the property is falling into decay;
- (7) where the property has been usurped, and the guardian has reason to fear that there is no chance of fair restitution.

In Ahmadellah v. Mafizuddin Ahmad¹ Sharma, J., observes that the word 'maintenance' as used in the clause 'where the minor has no other property and the sale is necessary for his maintenance' does not exclude other necessary expenses for mental and physical well-being of a minor in accordance with the status of the minor's family in the society. Thus the expenses of ordinary and reasonable education upto the Higher Secondary stage of a child were held part of his maintenance, and a sale of the minor's property by the legal guardian to meet the expenses was considered within the purview of law. The decision is said to have been 'in accord with the ideas about education expressed by the law-giver of Islam'². In Eishu Chugani v. Ranglal Agarwala³, where the father of two minors sold their property, and the minors had also some other properties besides the property sold, Ghose, J., held that if a minor had other properties and if

1 AIR 1973 Gau 56.

2 (1973) 9 Annual Survey of Indian Law, 221.

3 AIR 1973 Cal 64.

there was no evidence on the record to show that the property was in a bad state of decay, it could not be said that the guardian was within his power to sell the property and that the sale was valid. In Nasirul Hoque v. Johora Khatun¹ S.K. Datta, J., held that the clause that 'minor has no other property' should not be literally construed, and that its reasonable and proper interpretation should be that if a minor was seized of properties and if the properties did not yield income sufficient for his maintenance then it would not only be proper but necessary that all or some of the properties of the minor should be sold for the purpose of her maintenance. This was a case in which a minor daughter represented by her husband challenged the sale of her property effected by her father on the ground that the sale was not for her benefit.

Mere difficulty in managing the property on account of its being situated at a distance from the guardian's place of residence, and absence of profits from it are not grounds which entitle a guardian to sell the minor's property². A sale of a minor's property with fraudulent intention would be invalid³.

The same rules apply to a mortgage⁴. If a minor has no other means of paying his debts, ancestral or personal, his legal guardian can mortgage his property⁵. A guardian

1 AIR 1974 Cal 248.

2 Bharat v. Ramjan (1941) 45 CWN 489, 492.

3 S.C. Sircar, Tagore Law Lectures ---1873, 485 Art. 565.

4 Bhutnath Dey v. Ahmed Hosain (1885) 11 Cal 417; Yea juddin Pramanick v. Rup Manjari AIR 1936 Cal 326.

5 Abbas Husein v. Kiran Shashi Devi AIR 1942 Nag 12.

may borrow money for the support and education of the minor, and may pledge the minor's property for the purpose. All debts contracted validly and bona fide for the above purpose would form a charge on the minor's estate and could be paid out of the same¹. Broadly speaking, the power extends to cases where there is an absolute necessity or where the alienation is for the benefit of the minor. Thus the father or other lawful guardian may grant a lease, if it is for the benefit of the minor². The prohibition against alienation applies to immovable property to which the minor has an undisputed title, and does not apply where the minor's title to the property is disputed. Thus where the father of a minor sold part of the immovable property inherited by the minor from his mother, the title to which was in dispute, and the sale was made pursuant to a compromise which put an end to a pending litigation and which rendered practicable to effect the settlement of a large part of the land in the minor's favour and to obtain a fair price, the sale was held to be binding on the minor as being one for the benefit of the minor³. A settlement by a natural guardian for the management of a minor's property would not be binding on the minor unless there is urgent necessity or clear benefit to the minor for such settlement⁴.

1 Syed Ameer Ali, Mahommedan law Vol. 2 (4th ed., 1917), 614.

2 Zeebunnissa Begum v. Mrs. Danagher AIR 1936 Mad 564.

3 Kali Dutt Jha v. Abdul Ali (1888) 16 Cal 627 (PC); Rahimuddin v. Abdul Malik Bhuyia PLD 1968 Dac 801.

4 Aliyumma v. Kunhammed (1910) 34 Mad 527.

1.2.3. Contract by natural guardians

Under Muslim law a legal guardian can make a contract on behalf of a minor and the minor's estate would be bound by such contract if it is for the minor's necessity or benefit. Macnaghten said¹:

"In the case of a contract where there is a possibility of loss, it has been held that a near guardian (by which is meant a father or grandfather or guardians duly appointed by them) is at liberty to enter into it, but that a remote guardian, such as an uncle or a brother, is not at liberty to enter into such contract on behalf of the minor. Where, however, nothing but loss can accrue to the minor, such as in case of making a donation or granting a loan, it is not legal for any guardian, near or remote, or for any executor or other person under whose care he is, to act on his behalf".

Ever since the decision in Mir Sarwarjan v. Fakhruddin Mahomed² it has been held by the courts of India, Pakistan and Bangladesh that a guardian has no power to enter into a contract for the purchase of property on behalf of a minor. But we have seen in chapter 3 that the said Privy Council decision was not properly understood by the courts as well as by the text-book writers. In fact what the Privy Council decision means is that if the guardian has the legal capacity to act on behalf of the minor, he may enter into a contract provided the transaction is for the necessity of the minor or advantageous to him. In Amir Ahmmad v. Meer Nizam Ali³ a Full Bench of the Hyderabad High Court held that a de jure Muslim guardian could bind by personal covenant a Muslim minor even when the covenant was for the

1 Moohummudan law, 305-06 case 2; Sircar, TLL, 483-84 Art. 563.

2 (1911) 39 IA 1 (PC).

3 AIR 1952 Hyd 120 (FB).

purchase of immovable property if the contract was for the necessity and benefit of the minor. Similarly in Muhammad Mursaleen v. Noor Muhammad¹ Qadeeruddin, J., of Karachi High Court held that the father of a Muslim minor was entitled to enter into a contract to purchase property on behalf of his minor son and such a contract was enforceable against the minor.

1.2.4. Trade by natural guardians

Syed Ameer Ali says that a guardian may carry on a trade on behalf of the minor, but in doing so he must be careful not to go beyond the bounds of ordinary prudence or to engage in hazardous or speculative transactions. The courts generally hold that a guardian should not carry on a business on behalf of a minor, especially if it is one which may involve the minor's estate in speculation or loss; and any debt incurred for such trade or business will not be binding on the minor's estate. If after the death of a Muslim his adult sons carry on their father's business for the benefit of the other heirs of the deceased including his minor sons, the minors are not liable for any losses incurred therein². The minors can claim shares in the profits made by the adult members in the business by the use of their assets because the adult members are bound in a fiduciary character to account to the minors for profits arising from the shares of the minors under section 88 illustration (f)

1 PLD 1968 Kar 163.

2 Khorasany v. Acha AIR 1928 Rang 160; Ahmad Ibrahim v. Muiyappa AIR 1940 Mad 285.

of the Trusts Act of 1882¹; and further the adult members being placed in the dominant position they had in relation to the whole business under section 90 of the said Act, they must hold for the benefit of the minors any advantage gained by the use of their position including the profits accruing from such business². Section 90 of the Trusts Act runs as follows:

"Where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted in gaining such advantage".

In Abdul Rahim v. Abdul Hakim³, where a Muslim business man died leaving an adult son, a widow and some minor children, and the adult son continued the family business for the benefit of the family and made profits thereby, Wallace and Pandalai, JJ., held that the adult son by his conduct after the father's death put himself in a fiduciary relationship to the widow and the minors, and that the assets and profits of the business were held by him not as co-owner but as trustee under section 88 of the Trusts Act. The adult son was therefore liable to account under section 23(f) of

1 The illustration provides: "A and B are partners. A dies. B, instead of winding up the affairs of the partnership, retains all the assets in the business. B must account to A's legal representative for the profits arising from A's share of the capital".

2 Shukrullah v. Zohra Bibi (1932) 54 All 916.

3 AIR 1931 Mad 553.

that Act. Section 23(f) provides as follows:

"Where the breach consists in the employment of trust-property or the proceeds thereof in trade or business, he is liable to account, at the option of the fiduciary, either for compound interest (with half-yearly rests) at the same rate, or for the nett profits made by such employment".

1.3. Alienations by natural guardians under the GWA

As seen in chapter 2, the GWA does not interfere with the personal laws of the Hindus and the Muslims. Section 19 of the GWA prohibits the court from appointing the guardian of a minor whose father or husband, as the case may be, is alive and is not unfit to be the guardian¹. The powers of a natural guardian are not affected by the restrictions which the GWA places upon the powers of guardians appointed by the court. The powers of a natural guardian are however larger than those of a guardian appointed under the GWA. He may alienate the property of a minor without the sanction of the court², and the validity of his acts are determined by the limitations prescribed by the provisions of section 27 of the GWA. Once a person is denoted as natural guardian under the personal law of the minor, the GWA does not make any difference between the Hindus and the Muslims. The general provisions of its section 27 are applicable to all alike.

1 Siddiq-un-Nissa v. Nizam-Uddin (1931) 54 All 128. 132.

2 Jalaluddin Shaikh v. Kshirode Chandra Tikadar PLD 1960 Dac 948, 951.

2. De facto guardians and alienation

2.1. Who are de facto guardians under Muslim law?

A person who is neither a legal guardian nor a guardian appointed by the court but who voluntarily places himself in charge of the person and property of a minor is called a de facto guardian. The expression 'de facto guardian' is used in contradistinction to 'de jure guardian'. Legal guardians and guardians appointed by the court are known as de jure guardians. As seen earlier, under Muslim law the father, father's father and executors appointed by them are legal guardians of the property of a minor. Therefore the mother, brother, uncle and all relations other than the father and father's father are de facto guardians, unless they are appointed executors by the will of the father or father's father, or are appointed guardians by the court.

2.2. Alienation by de facto guardians

Under Muslim law a de facto guardian is merely a custodian of the person and property of the minor. Unlike a de facto guardian under Hindu law, he has no power to transfer any right or interest in the immovable property of the minor. A sale, mortgage or any other transfer by him of the minor's immovable property is void¹, and it does

¹ Sita Ram v. Amir Begum (1886) 8 All 324; Baba v. Shivappa (1895) 20 Bom 199; Moyna Bibi v. Banku Behari (1902) 29 Cal 473; Imambandi v. Mutsaddi (1918) 23 CWN 50 (PC); Mohd. Shafi v. Kulsum Bi (1923) 4 Lah 467; Fateh Din v. Gurmukh Singh AIR 1929 Lah 810, 811; Mohd. Sultan v. Abdul Rahman AIR 1937 Rang 175, 178; Gulam Husain v. Mir Jakirali AIR 1939 Nag 27; Sambhu v. Piyari AIR 1941 Pat 351; Ramchandrayya v. Abdul Kadir AIR 1948 Mad 37, 38; Venkama v. S.V. Chisty AIR 1951 Mad 399; Mohd. Sarder v. Gyanu AIR 1952 Nag 17; Zafir v. Amiruddin AIR 1963 Pat 108; Maimunnissa Bibi v. Abdul Jabbar AIR 1966 Mad 468; Parshotamdas v. Bai Dhabu AIR 1973 Guj 88.

not confer any title on the transferee¹. Before the Privy Council decision in Imambandi v. Mutsaddi² it was held in a number of cases³ that if the alienation was for legal necessity or for the benefit of the minor, it was valid and the minor was bound by such alienation. If a de facto guardian made a sale or mortgage in order to satisfy a mortgage or other debt of the minor's father or other person from whom the minor inherited or acquired property, such sale or mortgage would not be binding on the minor⁴. Where a mother executes a mortgage of her minor children's property inherited from their father, to pay off a prior mortgage effected by the minors' father, and also for the maintenance of the children, the mortgage was held to be void and a decree conditional upon the payment of the amount by which the minors were benefited was granted to the children⁵. In setting aside a mortgage by a mother on behalf of her minor son, the Madras High Court also held that the court had the discretionary power under section 41 of the Specific Relief Act (Act 1) of 1877 to make it a condition that the minor should refund the amount by which his estate was benefited⁶. So also where a mother executed as de facto

1 Mastu v. Nand Lal (1890) PR 200 (FB); Nizamuddin v. Anandi Prasad (1896) 18 All 373; Sarder Shah v. Haji (1909) PR 75, 76; Uttam Singh v. Gurmukh Singh (1913) PR 54, 55; Choqhatta v. Asa Mal (1913) PR 108, 109.

2 (1918) 23 CWN 50.

3 Hasan Ali v. Mehdi Husain (1877) 1 All 533; Majidun v. Ram Narain (1903) 26 All 22; Mofazzal v. Basid Sheikh (1906) Cal 36; Ram Charan v. Anukul Chandra (1906) 34 Cal 65; Ummi Begum v. Kesho Das (1908) 30 All 462; Fakiruddin v. Abdul Hussain (1910) 35 Bom 217; Abid Ali v. Imam Ali (1916) 38 All 92; Kapura v. Shankar Das (1918) PR 350.

4 Mata Din v. Ahmad Ali (1912) 16 CWN 338 (PC).

5 Rang Ilahi v. Mahbub Ilahi AIR 1926 Lah 170.

6 Kadir Meeral v. Mohd. Koya AIR 1956 Mad 368.

guardian a mortgage on behalf of her minor son for the maintenance of the son, the son could not recover the property without restoring the benefit received, even though the transaction was void¹.

A de facto guardian cannot lawfully enter into a lease on behalf of the minor; but once the lease is granted by him, the minor can sue the lessee under section 70 of the Contract Act of 1872 for compensation for use and occupation of the land². He cannot give consent on behalf of the minor to validate a bequest to the minor's co-heirs³, nor can he enter into a family settlement in respect of a minor's property, even though the settlement may be for the minor's benefit⁴. He can, however, make a settlement of the minor's agricultural land with tenants for agricultural purposes⁵. He has no power to refer to arbitration disputes as to the distribution of the minor's father's properties, and the minor is not bound by an award on such a reference⁶; nor does subsequent appointment of the de facto guardian as guardian of the minor under the GWA make the award binding upon the minor in the absence of the court's approval of the reference⁷. A deed of partition to which

1 Ahmad Khan v. Miraj Din AIR 1940 Lah 80, 81; Abbas v. Kiran AIR 1942 Nag 12, 14.

2 Azizul Rahman v. Choithram Chellaram AIR 1940 Sind 129, 131.

3 Bibi Kulsoom v. Mt. Mariam AIR 1933 Oudh 97, 98.

4 Mohd. Amin v. Vakil Ahmad AIR 1952 SC 358.

5 Tahad Ali v. Sheikh Israrullah (1929) A11 89, 94.

6 Ameer Hasan v. Mohd. Ejaz Husain AIR 1929 Oudh 134, 139; Mohd. Ejaz v. Mohd. Iftikhar AIR 1932 PC 76, 79.

7 Johara Bibi v. Mohd. Sadak AIR 1951 Mad 997, 1001; Abdul Karim v. Mt. Maniran AIR 1954 Pat 6, 7.

a minor is a party represented by his mother as de facto guardian is void and not binding on him¹.

An alienation effected by the de facto guardian of a minor's property cannot be ratified by the minor on attaining majority². The de facto guardian has no power to make a compromise on the minor's behalf³, or enter into any contract whereby he could saddle the minor with any pecuniary liability⁴, and such contract cannot be specifically enforced against the minor or his property⁵. He cannot impose any personal obligation on the minor by executing a promissory note in respect of the liability for the minor's father's debts or by renewing an existing one⁶. A borrowing on the personal credit of the minor to clear off a decree on a mortgage executed by the de facto guardian on behalf of the minor cannot be deemed to be an act arising from the wants of the minor and such a borrowing cannot bind the minor's estate⁷.

A de facto guardian cannot carry on business on behalf of the minor⁸. He is not competent to enter into a partnership agreement binding on the minor. A mother being a de facto

1 Assiz v. Chittamma AIR 1954 Trav-Co 370.

2 Anto v. Reoti Kuar AIR 1936 All 837, 838 (FB); Karim v. Jaikaran AIR 1937 Nag 390; Ziarat Gul v. Mian Khan PLD 1950 Pesh 69.

3 Zafir v. Amiruddin AIR 1963 Pat 108.

4 Ghulam Ali v. Inayet Ali AIR 1933 Lah 95, 96.

5 Jaina Beevi v. Govindaswami AIR 1967 Mad 369.

6 Naziruddin Ashraf v. Kharagharain AIR 1939 Pat 29.

7 Kunhibi v. Kaliani Amma AIR 1939 Mad 881.

8 Abdul Rahim v. Abdul Hakim AIR 1931 Mad 553, 556; Ahmad Ibrahim v. Meyyappa AIR 1940 Mad 285, 287.

guardian is not competent to enter into a contract pledging her minor children's shares in the assets of their deceased father's firm¹.

2.3. Doctrine of necessity for alienation under Muslim law

As seen earlier under Muslim law a legal guardian can alienate the minor's immovable property for the necessity or benefit of the minor. Some² may apprehend that the doctrine of necessity or benefit of the minor is an importation of Hindu law principle into Muslim law; but such an apprehension is not correct. This doctrine is inherent in Muslim law in relation to transactions with minors' property³. In its application in Indian cases the doctrine used to be referred to by the Indian Benches and the Bars in fit cases; and even alienations by de facto guardians were justified under it⁴. But in 1918 in Imambandi v. Mutsaddi⁵ their Lordships of the Privy Council in deciding the question "how far or under what circumstances according to Mahommedan law, a mother's dealings with her minor child's property are binding on the infant" unfortunately observed:

"Under the Mahommedan law a person who has charge of the person or property of a minor without being his legal guardian, and who may, therefore, be conveniently called a 'de facto guardian', has no power to convey to another any right or interest in immovable property which the transferee can

1 Federation of Pakistan v. Pioneer Bank, Ltd. PLD 1958 Dac 535.

2 Justice Abdur Rahim in Hyderman Kutti v. Syed Ali (1912) 23 MLJ 244, 247; and in Abdul Majeeth v. Krishnamachariar (1917) 40 Mad 243 (FB).

3 Hedaya, 702; Baillie, Digest Vol. 1, 687.

4 Hyderman Kutti v. Syed Ali (1912) 23 MLJ 244.

5 (1918) 23 CWN 50, 63.

enforce against the infant; nor can such transferee, if let into possession of the property under such unauthorised transfer, resist an action in ejectment on behalf of the infant as a trespasser".

The questions arise: Was the law prior to this decision the same? Did their Lordships consider cases of extreme necessity and benefit of the minor? Is there any direct prohibition in Muslim law against assigning capacity to de facto guardians? Are the authoritative texts on Muslim law uncompromising on the dealings of a de facto guardian with the minor's property?

So far as the first question is concerned their Lordships in Imambandi's case observed that the decisions of different High Courts of India as to a de facto guardian's capacity to deal effectively with his minor ward's property in Muslim law are not uniform. So they felt the desirability of laying down a definite rule on the subject; and they did it by examining virtually the decision of a single High Court case¹ and referring to a single Privy Council decision². Let us see, in brief, what exactly was the situation before this historic judgment.

2.3.1. Earlier decisions of different High Courts of India

The cases of the Indian High Courts show that in Muslim law the alienations of a minor's property could be

¹ Hyderman Kutti v. Syed Ali (1912) 23 MLJ 244.

² Mata Din v. Ahmad Ali (1912) 16 CWN 338 (PC).

made by persons other than legal guardians either as de facto guardians or as co-heirs representing the estate of the deceased for the payment of the deceased's debts. We are not concerned with the latter type of persons and their alleged alienations.

Prior to the decision in Imambandi's case the Calcutta High Court followed more or less the principle of extreme necessity and benefit of the minor to determine the validity of transfers of minors' property by de facto guardians. The first relevant case in which the test was applied is probably Mussamut Bukshun v. Mussamut Doolhine¹. It was a case in which the adult elder brother of two minor sisters sold as guardian the shares of his minor sisters in the estate to pay off certain family debts. Norman, J., relying on the authority of Macnaghten² and particularly on 'fuzuli sale' [sale of the property of another without his consent] held that in case of urgent necessity or very clear advantage to the minor such a sale would be permitted. This principle was also upheld in the case of a de facto guardian's disposition of a minor's movable property³. Although in Moyna Bibi v. Banku Behari⁴ Rampini and Pratt, JJ., set aside a sale by a de facto mother-guardian on the ground of her absence of authority to deal with a minor's estate, they doubted whether, if the sale was for the manifest advantage of the minor⁵, it could

1 (1869) 12 WR 337 (CR).

2 Moohummudan law, 305 ch. VII case 2.

3 Mussumat Syedun v. Syed Velayet Ali Khan (1872) 17 WR 339; Mofazzal Hosain v. Basid Sheikh (1906) 34 Cal 36.

4 (1902) 29 Cal 473.

5 Ibid, 478.

not be upheld under Muslim law. This doubt was materialised after four years, and in Mofazzal Hosain v. Basid Sheikh¹ Rampini and Woodroffe, JJ., decided that a sale for urgent necessity in order to pay the debts due by the deceased and for the maintenance of the minor was valid in Muslim law. The learned judges distinguished the decision in Moyna Bibi's case by observing that it had not been shown there that the alienation of the minor's property was for the benefit of the minor. In Ramcharan Sanyal v. Anukul Chandra Acharjee² Maclean, C.J., and Casperz, J., followed Mofazzal Hosain's case, and held that a sale by the mother as de facto guardian of her minor son was good and valid if it was found to have been made bona fide and for the benefit of the minor.

The Allahabad High Court adopted the same principle. Spankie and Oldfield, JJ., in Hasan Ali v. Mehdi Husain³, where the paternal aunt of the minor acting as a guardian sold the minor's property to pay off the latter's ancestral debts and meet the necessity of the minor, held that the sale was binding on the minor. The obiter observation of Mahmood, J., in Sita Ram v. Amir Begum⁴ that the mother could not exercise any power of disposition with reference to her minor children's property, cannot be accepted, as the mother in that case did not profess to act on behalf of her

1 (1906) 34 Cal 36.

2 (1906) 34 Cal 65.

3 (1877) 1 All 533.

4 (1886) 8 All 324.

minor daughters, and the transferee from the mother was not a bona fide one for value because he had the knowledge of the existence of other heirs besides the widow and the son. In Girraj Bakhsh v. Kazi Hamid Ali¹ Edge, C.J., did not apply his mind to test the validity of the alienation; he was much concerned with the application of the equity principle. Following an earlier decision of the same court Blair and Banerji, JJ., found in Majidun v. Ram Narain² that where the de facto guardian of a minor girl sold the minor's property to pay partly the debts of the deceased father and partly government revenue, the sale was binding on the minor. In Ummi Begum v. Kesho Das³ the minor daughter could not impeach the sale of her lunatic father's property effected by her mother for her (the minor's) benefit. In deciding inter alia whether the de facto mother-guardian could mortgage her minor son's property Banerji and Walsh, JJ., held in Abid Ali v. Imam Ali⁴ that in case of necessity and for the benefit of the minor the mother was competent to make a valid mortgage of her minor son's property.

The Bombay High Court did not disapprove of the trend followed by the Calcutta and Allahabad High Courts. In Hurbai v. Hiraji Byramji⁵ the mother and one adult brother of a minor on their own behalf and as guardians of the minor mortgaged the property inherited from the deceased father; Starling, J., treated the guardians as having the power

1 (1886) 9 All 340.

2 (1903) 26 All 22.

3 (1908) 30 All 462.

4 (1915) 38 All 92.

5 (1895) 20 Bom 116.

to mortgage or sell the minor's property if there was absolute necessity for the transaction, or if it was for the benefit of the minor. In this case, however, the mortgage was not upheld, since the purposes for which the money was raised by the guardians were not for the benefit of the minor. The question of a de facto guardian's power to deal with the minor's property was also raised in Baba v. Shivappa¹ and Fakiruddin v. Abdul Hussain²; and in both cases the de facto guardian's alienation was upheld.

The Madras High Court in its earlier decisions³ did not express any definite opinions on the de facto guardian's alienating authority and the validity of such alienation, if made for necessity and benefit of the minor. Wallis and Krishnaswami Ayyar, JJ., following the Calcutta and Bombay High Court decisions held in Aliyamma v. Kunhammad⁴ that a guardian's powers in respect of the minor's immovable property were very restricted in Muslim law and that urgent necessity or clear benefit to the minor must be shown before an alienation by the de facto guardian could be upheld. In Hyderman Kutti v. Syed Ali⁵ Abdur Rahim, J., held that the de facto guardian of a minor could alienate the minor's property in 'cases of urgent and imperative necessity and in cases which are necessarily beneficial to the minor'.

1 (1895) 20 Bom 199.

2 (1910) 35 Bom 217.

3 Pathummabi v. Vittil Ummachabi (1902) 26 Mad 734; Durgoji Row v. Fakir Sahib (1906) 30 Mad 197; Abdul Kadir v. Chidambaram (1908) 32 Mad 276.

4 (1910) 34 Mad 527.

5 (1912) 23 MLJ 244.

A similar view was adopted in the Patna High Court. In Sheikh Rajab Ali v. Sheikh Wazir Ali¹ it was held that the mother of a minor child could validly alienate the minor's property if it was for the benefit or advantage of the minor. The Chief Court of Punjab also followed a similar view. In Anant Ram v. Nazir Hussain² Barkley and Burney, JJ., held that under Muslim law the mother was not the legal guardian of her minor children but if she alienated any property of her minor child for the latter's benefit the minor would be bound. In Dad v. Gala Ram³ the question of alienation for the minor's benefit was not raised; but in Fazl Ilahi v. Yakub Mirza⁴, where the mother mortgaged the minor's estate for the alleged purpose of celebrating the minor's marriage it was held that the mother was not authorised to effect the mortgage. The question of necessity and benefit was pleaded, but the learned judges of the Division Bench were not convinced that the mortgage money was spent for the minor's benefit. In Kapura v. Shankar Das⁵ the decision in Hyderman Kutti's case was followed.

However, the High Court of North-West Provinces had held in Sahu Ram v. Mohammed Abdul Rahman⁶ that a mother could not lawfully sell her minor son's property, even though the sale was made by the mother in good faith and

1 (1916) Pat LJ 188.

2 (1883) PR 433.

3 (1889) PR 154.

4 (1889) PR 680.

5 (1918) PR 350.

6 (1884) N.-W.P HC Rep. 268.

for the discharge of a debt adjudged to be due by the father. But the necessity and benefit was little considered as the minor was not a direct party to the suit. Pearson and Spankie, JJ., in Mirza Pana Ali v. Sadik Hossain¹ held the sale by the mother of a minor son's share in a property as invalid without deciding whether the transaction was for the benefit of the minor.

The Chief Court of Oudh also followed a contrary view. In Matadin v. Ali Mirza² where the mother sold the property of her minor children to satisfy a mortgage decree, the court did not consider the sale as valid. Again in Amba Shankar v. Ganga Singh³ Chamier and Wells, A.J.Cs., held that a mother had no power whatsoever to deal with the property of her minor children, even if such dealing was 'assumed to be for the benefit of the minors'. Greeven and Chamier, J.Cs., in Mata Din Sah v. Shaikh Ahmad Ali⁴ reviewed the earlier decisions of some of the High Courts, discussed the available translated authorities on Muslim law and held that the mortgage of a minor's property by a person who was not the minor's natural guardian or a judicially appointed guardian was absolutely void, even though it might have been executed to pay off debts legally payable by the minor.

2.3.2. Earlier Privy Council decisions

Besides these High Courts' and Chief Courts' decisions

1 (1875) N.-W.P HC Rep 201.

2 (1902) 5 OC 197.

3 (1906) 9 OC 97.

4 (1908) 11 OC 1.

there were two Privy Council decisions regarding the guardian's authority to deal with a minor's property. The first one was reported in Kali Dutt Jha v. Abdul Ali¹. In this case the minor inherited some property from his mother and his father sold it. Their Lordships of the Privy Council upheld the sale on the ground that the sale was for the benefit of the minor, inasmuch as it terminated a dispute which was there in respect of the minor's title to the property. This case was not relevant to the de facto guardian's powers, it simply approved of the statement of law regarding the natural guardian's powers contained in Macnaghten's book². The second Privy Council case was Mata Din v. Ahmad Ali³. The question involved in this case was whether the transfer of a minor's property by a person who was not his natural guardian could be upheld, when made to discharge a debt payable by the minor. The facts of the case show that a minor's share in an estate was sold by his elder brother along with his own share to pay an ancestral debt. The estate was already in mortgage executed by their ancestor, and the vendee was in possession of the property. On attaining majority the younger brother ignoring the sale brought a suit against the vendee-mortgagee for redemption of his share. The lower courts decreed the plaintiff's claim. In the Privy Council Lord Robson in delivering the judgment

1 (1888) 16 Cal 627 (PC).

2 Principles and Precedents of Moohummudan law, 64 ch.VIII prin. 14.

3 (1912) 16 CWN 338 (PC).

of the Board observed¹:

"It is difficult to see how the situation of an unauthorised guardian is bettered by describing him as a 'de facto' guardian. He may, by his de facto guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell".

2.3.3. Rule of Imambandi v. Mutsaddi²

In this state of rulings of the different courts of India, the oft-quoted Imambandi's case came before the Privy Council in 1918. This was a case in which the mother sold for herself and as guardian of her two minor children their shares in her deceased husband's estate to the plaintiff primarily to avoid a litigation brought by the defendants who were disowning her and her children's shares in the estate. The question that came for decision was how far according to Muslim law a mother's dealings with her minor children's property were binding on the minors. Their Lordships, per Ameer Ali, observed³:

"The mother has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge for the time being of the infant".

Now we come to our second question: did their Lordships consider the cases of extreme necessity and benefit of the minor? From the facts of the case it appears that the question did not arise at all. The contending defendants did not

1 (1912) 16 CWN 338, 345 (PC).

2 (1918) 23 CWN 50.

3 Ibid, 57.

claim through the minors; on the contrary, they were establishing their right in the whole estate illegitimating the minors. It appears from the judgment that their Lordships were more concerned in establishing the principles of law than in finding whether the alienation was for the necessity or benefit of the minors. However, there was little scope in that case to consider the minors' necessity or welfare, unless one could look beyond the immediate facts. In their judgment their Lordships relied on the earlier Privy Council decision in Mata Din's case (1912) where Lord Robson in delivering the judgment of the Board of which Ameer Ali himself was also a member, adopted mainly the reasoning of Greeven, J.C., in Mata Din Sah v. Sheikh Ahmad Ali¹, against whose judgment the appeal was made to the Privy Council.

In Mata Din Sah's case (1908) the concerned party failed to prove the necessity and benefit of the minor. In that case Greeven, J.C., examined the authority of the following passage of Ameer Ali's book²:

"A mother is not a natural guardian. She is entitled to the custody of the persons of her minor children but she has no right to the guardianship of their property. If she deals with their estate without being specially authorised by the judge or by the father her acts should be treated as the acts of fuzulee [one who sells the property of other without the consent of the owner]. If they are to the manifest advantage of the children, they should be upheld; if not they should be set aside".

1 (1908) 11 OC 1.

2 Mahommedan law Vol. 2 (Calcutta: 2nd ed., 1894), 476.

The authority of the passage was first doubted in Moyna Bibi v. Banku Behari¹ and next in Amba Shankar v. Ganqa Singh². But in none of them was it discussed. Greeven, J.C., based his argument mainly on the term 'fuzuli'. His contention was that as a minor could not give a valid consent so a fuzuli's contract which needs the consent of the owner, could not take place in the case of minors. Greeven, J.C., failed to realise that this is an exception to the generally accepted rule. It is to provide 'great advantage' to a person who himself does not make the contract; it does not correspond to the law of agency. The following relevant portion from the Hedaya³ about a fuzuli contract will bear it out:

"If a person sell the property of another without his order, the contract is complete, but it remains with the proprietor either to confirm or dissolve the sale as he pleases ... there is no injury in this (contract) to the proprietor (as he has the power of dissolving it), it is attended with a great advantage to him".

No time is fixed for the consent to be given in this kind of contract; but it is accepted that until it is given, the contract remains suspended or voidable. The Fuzuli contract is equivalent to negotiorum gestio in Roman law. Like the negotiorum gestor, the fuzuli 'introduces himself unmasked into another person's affairs'⁴, and he validly transfer the property of his 'friends or acquaintances'⁵

1 (1902) 29 Cal 473.

2 (1906) 9 OC 97.

3 Hedaya, 296.

4 Jolowicz, Historical Introduction to Roman law, 313.

5 Derrett, Critique, 431 para 545.

when it is to their advantage or benefit; and the transfer binds their property without their concurrence. The true owner can affirm or disapprove the transaction; but once it is affirmed it becomes absolutely binding on him.

That the minors could become parties to a fuzuli contract was established by their Lordships in the Privy Council case of Newab Mulka Jehan v. Mahomed Ushkuree¹ where the Judicial Committee found the marriage of a minor as fuzuli marriage and held that such marriage needed assent after the attainment of the minor's maturity. Again, although it appears that Lord Robson left open the question whether a sale by a de facto guardian, if made of necessity, or for the payment of ancestral debt and beneficial to the minor, is altogether void or voidable, had that sale been proved to have been made of necessity or beneficial to the minor, the decision might probably have swung to the latter group.

It is submitted that in Mata Din Sah's case Greeven, J.C., did not properly understand the passage of Ameer Ali's book against its academic background. The learned judicial commissioner followed Sita Ram's² and Amba Shankar's³ case. In Amba Shankar's case the passage of Ameer Ali's book was rejected on the ground that 'no authority is cited by the author'⁴. But could it be asked what justification prompted

1 (1873) IA Suppl. 192.

2 (1886) 8 All 324.

3 (1906) 9 OC 97.

4 Ibid, 99.

the learned judicial commissioner to follow Sita Ram's case? As said earlier the reasoning in Sita Ram's case was obiter and less persuasive as Mahmood, J., did not cite any authority in support of his statement of principle of law. However, the author himself has dropped the passage from his book in its subsequent edition. The author did not assign any reason in the preface of the 5th edition in which it is dropped for this quiet dropping of the passage; on the contrary, he naively has given the whole judgment of Imambandi's case at the appendix of his book. Even in the 4th edition of the book the relevant passage was there. Wilberforce, J.C., in Kapura v. Shankar Das¹ cited the passage from 4th edition Vol. 2, page 611.

2.4. Muslim legal texts and the doctrine of necessity

We shall now consider the third and the fourth questions together. The Muslim legal authorities do not in fact provide any guiding light to the problems, unless they are pieced together and read supplementing one authority by another. The dearth of authorities is mainly due to the fact that in Muslim law it is ordinarily assumed that a minor should be in the care and custody of the executor of his father. Thus the law relating to the powers and duties of an executor may be taken to apply to the guardian of a minor's property.

¹ (1918) PR 350.

The author of the Hedaya in laying down the general rules with respect to an infant's property observes¹:

"If a person bestow anything in gift or alms upon an orphan under the protection of a particular person, it is lawful for that person to take possession of such gift or alms on his behalf. It is here proper to remark, that acts in regard to infant orphans are of three descriptions:-

I. Acts of guardianship, such as contracting an infant in marriage, or selling or buying goods for him; a power which belongs solely to the walee [wali], or natural guardian, whom the law has constituted the infant's substitute in those points.

II. Acts arising from the wants of the infant, such as buying or selling for him on occasions of need, or hiring a nurse for him, or the like; which power belongs to the maintainer of the infant, whether he be the brother, uncle or (in case of a foundling) the Mooltakit, or taker-up, or the mother, provided she be maintainer of the infant; and as these are empowered with respect to such acts, the walee, or natural guardian, is also empowered with respect to them in a still superior degree; --- nor is it requisite, with respect to the guardian, that the infant be in his immediate protection.

III. Acts which are purely advantageous to the infant, such as accepting presents or gifts, and keeping them for him; a power which may be exercised either by a Mooltakit, a brother or an uncle, and also by the infant himself, provided he be possessed of discretion, the intention being only to open a door to the infant's receiving benefactions of an advantageous nature".

Of the three classes of acts, class I need not be considered, for it refers to the acts of a de jure guardian; so also class III, for it does not refer to sale or mortgage but to the acceptance of gifts. Although in class III mother is not mentioned as capable of performing those acts, in the interest or advantage of the estate of the minor, she can do them². Class II refers to acts which may be performed

1 Hedaya, 608.

2 Ibid, 699.

by a de facto guardian, although a de jure guardian possesses the same power in a superior degree. They are acts necessary for supplying the wants of the minor, and may be performed by the brother, uncle, mother or the Mooltakit in their individual capacity as guardian. For these acts their powers to transact the minor's property are inherent powers, and for them they need not be empowered by a judicial officer, such is the implication of the parenthetical clause 'and as these are empowered in respect of such acts',¹. These powers are their natural powers like those of the wali. In the absence of natural guardians and for the manifest advantage and extreme necessity of the minor the de facto guardian may exercise them.

This passage of the Hedaya was quoted by their Lordships of the Privy Council in Imambandi's case and a Full Bench of the Sind Judicial Commissioner's Court in Naraindas v. Mt. Obhai². But the passage was not properly appreciated. First, they failed to realise that the second class of acts is an exception to the first class of acts; these are acts of extreme necessity and purely advantageous to the minor. The full formalities of law are relaxed in their case, because of the very nature of their urgency. Their Lordships of the Privy Council and the learned judges of the Full Bench did not consider this urgent nature of the acts. They did not like to allow the de facto guardians to transact a minor's

1 Hyderman Kutti v. Syed Ali (1912) 23 MLJ 244, 250.

2 (1913) 19 IC 911 (FB).

property under this class of acts, unless they were empowered by a judicial officer. The derivative authority of which they spoke is not implied from the actual meaning of the words used in the original Arabic and translated Persian version of the Hedaya¹. Their contention was that when an almost absolute restriction was imposed on the powers of legal guardians on the ground of conservation of minor's property, how could a de facto guardian claim such powers? But it may be said that restriction on the ground of conservation does not imply that the property cannot be transferred even in cases of extreme necessity. It simply implies that an immovable property, as it is, should not be changed into a movable one. Alienation of a property in the case of necessity or for the benefit of the minor is quite different from the alteration of character of the property for conservation. Secondly, their Lordships tried to restrict the powers of de facto guardians by referring to the classification of goods into movable and immovable. They assumed that the power of alienation could be exercised only in the case of movable goods. The words used in the original Arabic text are 'eiziju kabjat al-habbat al-sadaqat'² which imply all sorts of property obtained by gift or alms and do not admit of any such division. Moreover, in the case of transfer Muslim law hardly recognises any distinction between movable and immovable property. Baillie observes³:

1 On Professor Derrett's reference Dr. T.O. Gandjei, Professor of Persian in the University of London helped me in explaining the exact meaning of the words used in the Persian version of the Hedaya.

2 See Ali ibn Abi Bakr, Al-Hidayah fi al-furu (5th ed.), 460.

3 Moohummudan Law of Sale, 42 of the introduction.

"Things are commonly divided into movable and immovable, the latter comprehending land and things permanently attached to it. But the distinction is not of much importance in the Moohummudan law, as the transfer of land is in nowise distinguished from that of other kinds of property".

Reviewing the opinions of the different schools of Muslim law in this regard J.N.D. Anderson observes that there is little which is of fundamental interest in the differences between real and personal property, or more correctly immovable and movable property¹.

Thirdly, their Lordships reasoned that if the de facto guardians were considered as fuzulis, even then the transfer could not be justified, as they thought that the parties to a fuzuli contract must be sui juris persons. But we have already seen that such a view is unsupportable; the minors could be parties of a fuzuli contract. Their attempt to find analogical identification of the fuzuli contract with the law of agency led them astray. Fuzuli contract is a Muslim counterpart of Roman negotiorum gestio, and is distinct from agency law.

Lastly, the second class of acts admits the utility of de facto guardianship; these acts are allowed to be performed by de facto guardians in extreme cases of necessity and they would be binding on the minor's property. The decision of their Lordships in Imambandi's case has denied this utility of de facto guardianship and caused hardship to the parties of a de facto guardian's contract. In the present state of society the Privy Council decision has

¹ J.N.D. Anderson, 'Islamic law', in (1975) 4/2 IECL, 103-106, 104.

created problems. What would happen in a case where there is no legal or court appointed guardian of a minor, and the minor has no other property except lands and a situation has arisen which demands immediately an amount of money which can be obtained only by the sale of the lands? In such a case the author of the Digest has shown in the following passage¹ that equity allows a de facto guardian to deal with the minor's property:

"When no executor has been appointed by the deceased, who has left both adult and minor children, the judge should appoint an executor; and if there be no judge, and the elder children maintain the younger out of their shares of the property, though they are legally responsible, they are justifiable, as between themselves and their consciences, for so meddling with the shares of the younger children".

Muslim legal texts do not therefore disregard cases of extreme necessity; and in proper and fit cases they uphold alienations by de facto guardians. The Privy Council decision has only put a road-block on the need of the society. In the modern nuclear family a Muslim mother should be given the position and power which her counterparts in Hindu and Christian society are enjoying.

Generally, the females are not considered in Muslim law to be endowed with any managing or administrative qualities. Thus they are deprived with the guardianship of the property of their minor children. In discussing the law relating to the powers of a Mooltakit with respect to the

1 Baillie, Digest Vol. 1, 464.

disposition of a minor's property the author of the Hedaya says¹:

"It is not lawful for the Mooltakit to perform any acts respecting the property of his foundling; analogous to the restriction upon a mother;- that is, a mother has a right to the charge of her infant child, but yet is not at liberty to perform any acts respecting his property; and the Mooltakit stands in the same predicament. The principle upon which this proceeds is that authority to act with respect to the property of an infant is established with a view to the increase of that property; and this is assured by two circumstances, perfect discretion, and complete affection; now in each of these two persons in question, only one of these qualities exists; for a mother, although she entertain a complete affection for her child, is deficient in point of discretion; and a Mooltakit, although he be possessed of perfect discretion, is deficient in affection".

It appears from the above passage that the only reason for which a mother in Muslim law fails to be considered to be able to deal with her minor child's property is her deficiency in exercising discretion. If, however, she effects a sale of her child's property, it would not be altogether void, but voidable only. To show the effect of such a sale Baillie has provided the following illustration²:

"A woman after the death of her husband sells property belonged to him, supposing herself to be his executrix, and her husband having left minor children; she after some time declares that she was not the executrix, her assertion, however, is not to be credited as against the purchaser, but the sale remains in suspense till her children arrive at puberty. If they should admit that she was the executrix the sale by her is lawful; but if they deny the fact the sale is void; and though the purchaser should have manured the purchased land, he has no recourse for reimbursement against the woman. What has been said is on the supposition that the woman sues for a cancellation of

1 Hedaya, 208.

2 Baillie, Moohummudan Law of Sale, 249.

the sale, on the ground that she was not the executrix; but if the minor sue on that ground his claim is to be heard".

Muslim law makes a sharp distinction between paternal and maternal properties of a minor and does not allow the mother or her executor to deal with the paternal property¹. This is due to the general notion of women's deficient mental faculty², the assumed idea of their physical debility³ to exercise the power to manage the property, the Arab tribal tendency to perpetuate the property within the family, and the 'facility of divorce on the one hand and remarriage of widows on the other'⁴.

If we consider the law as it was in the Arab tribal society as inadequate to meet the needs of modern nuclear families⁵ and accept the principles stated in Muslim legal texts as supplementing each other without conditioning or restricting one another the following principles may be evolved:

- (1) In case of necessity and for the benefit of the minor a natural guardian including the mother can deal with the minor's property, both movable and immovable;
- (2) in default of any natural guardian, the de facto guardians (persons belonging to immediate family)

1 Baillie, Digest Vol. 1, 689; see also Bhutnath Dey v. Ahmed Hosain (1885) 11 Cal 417, 421.

2 Hedaya, 208.

3 Ibid, 699.

4 Sita Ram v. Amir Begum (1886) 8 All 324.

5 J.N.D. Anderson, 'Recent reforms in the Islamic law of inheritance' in (1965) 14 LQR, 349; S.A. Raza, 'Modern reforms in Muslim family laws', in (1975) 14 Islamic Studies, 238; N.J. Coulson, Succession in the Muslim family (Cambridge: 1971), 135.

may, in extreme cases of emergency and for clear advantage of the minor, deal with such property; (3) the transaction will be voidable at the instance of the minor on his attaining majority, but the avoidance must be by returning the benefit obtained therefrom.

If these principles are followed "the most important safeguards provided by the Mahommedan law for the protection of the interests of infants"¹ would not be wiped out; on the contrary Muslim law of guardianship will present similarity with Anglo-Hindu law of guardianship; and the basic principles of guardianship would be restored, since a law which enquires who made the alienation and not why it was made² cannot meet the emergencies and protect the interests of the minors adequately under modern conditions. The courts have no doubt a duty to protect the interest of minors, but that does not imply creation of new problems. Kensington, C.J., observed³:

"As a general rule far less harm is done by leaving people to manage the affairs of their children in their own way than by attempting to do it for them through the agency of a District Court".

Their Lordships' consideration of Muslim law and the interpretation of Muslim legal texts demand rethinking.

1 Imambandi's case (1918) 23 CWN 50, 61 (PC).

2 H.S. Gour, Hindu Code (Nagpur: 4th ed., 1938), 301.

3 Hayat Khatoon v. Sharam Khatun (1914) PR 345, 347.

In the modern socio-economic environment it proves inadequate¹. The property guardianship of a Muslim minor should be considered in the light of the proposed principles, and the relations other than strangers should be considered as de facto guardians with powers to alienate the minor's property in the case of necessity and benefit of the minor.

2.5. Ghost of Imambandi's rule

Since Imambandi's case a sale, mortgage or any other transfer of a minor's immovable property by his mother², brother³, uncle⁴ or other relations as de facto guardian is considered void. Whenever there is a case of alienation of a Muslim minor's property by a de facto guardian, the courts follow the above Privy Council decision without taking the least trouble to distinguish them excepting a few which will be seen presently.

1 Derrett, Introduction, 87 para 112. The writer has rightly pointed out that it is not always advisable, financially at least, for a de facto guardian to be appointed by the court. He observes that where a minor's assets are worth, say, Rs 50, and the elder brother offers them for sale to provide the minor with food, the purchaser would be a fool to enquire why the brother did not apply for appointment.

2 Mohsiuddin Ahmed v. K. Ahmed (1920) 47 Cal 713; Laloo Karikar v. Jagat Chandra (1920) 25 CWN 258; Husena Bano v. Brojendra Kishore AIR 1929 Cal 82; Kannusami Chetti v. Rahimat Ammal (1933) 65 MLJ 548; Maideen v. Kunhalikutti AIR 1935 Mad 1059; Sambhu Gosain v. Piyari AIR 1941 Pat 351; Abdul Karim v. Mt. Maniran AIR 1954 Pat 6; Venkama Naidu v. Sayed Vilijan AIR 1951 Mad 399; Maimunnissa Bibi v. Abdul Jabbar AIR 1966 Mad 468; Jaina Beevi v. Govindswami AIR 1967 Mad 369.

3 Ram Autar v. Ghulam Dastagir AIR 1929 All 250; Fateh Din v. Gurmukh Singh AIR 1929 Lah 810; Anto v. Reoti Kuar (1937) All 195 (FB); Ardhanari Mudaliar v. Abdul Rahiman (1956) 1 MLJ 243; Rahimuddin v. Abdul Malik Bhuyia PLD 1968 Dac 801; Gulam Ghouse v. Kamisul AIR 1971 SC 184.

4 Ramchandrayya v. Abdul Kadir Chisthi (1948) Mad 270; Abdullah Khan v. Nisar Mohd. Khan PLD 1965 SC 690; Rashid Ahmed v. Amina Begum PLD 1968 Lah 1045.

2.5.1. Another Privy Council and the Supreme Courts' decisions

The mother's power to deal with her minor children's property was called in question in Mohd. Ejaz Hussain v. Mohd. Iftikhar Hussain¹, but whether the alienation was beneficial to the minors was not raised. In this case the mother as de facto guardian made a reference to an arbitration council of certain disputes relating to the family properties which the minors inherited from their deceased father. Under an award of the council some of these properties were transferred. On attaining majority the minors contended that they were not bound by the award. Their Lordships following Imambandi's case held that the mother as a de facto guardian had no power to refer to arbitration disputes in relation to the minors' immovable properties, and that the minors were not bound by such award.

In Mohd. Amin v. Vakil Ahmed² the validity of a family settlement was challenged by a minor younger brother on attaining majority. The facts of the case were that an elder brother acting on his own behalf and as guardian of his minor brother executed a family settlement for the distribution of properties belonging to their deceased father. The question how far the settlement was binding on the minor brother was raised before the Indian Supreme Court, but Bhagwati, J., without any discussion of the merits of the case, negatived

1 (1931) 59 IA 92 (PC).

2 AIR 1952 SC 358.

the benefit test by simply referring to Imambandi's case. The de facto guardianship of the elder brother was not recognised. In Abdullah Khan v. Nisar Mohd. Khan¹ the Pakistan Supreme Court following Imambandi's case did not consider the application of a paternal uncle to be appointed as the property guardian of a minor; nor did the Indian Supreme Court in Gulam Ghouse v. Kamisul² following the same Privy Council decision admit the guardianship of a minor's brother.

2.5.2. High Courts' decisions

Similar to the Privy Council and the Supreme Courts the High Courts of India, Pakistan and Bangladesh did little to assess the question of a minor's necessity and benefit, and thereby admit the utility of de facto guardianship. The High Courts of Calcutta³, Madras⁴, Bombay⁵, Allahabad⁶, Nagpur⁷ and the others⁸ followed the Privy Council decision in Imambandi's case. In some cases, however, some judges

1 PLD 1965 SC 690.

2 AIR 1971 SC 2184.

3 Mohsiuddin Ahmed v. K. Ahmed (1920) 47 Cal 713; Husena Bano v. Brojendra Kishore AIR 1929 Cal 82.

4 Abdul Majid v. Ramiza Bibi AIR 1931 Mad 468; Venkama v. Sayed Vilijan AIR 1951 Mad 399; Jaina Beevi v. Govindaswami AIR 1967 Mad 369.

5 Bhikaji Ramchandra v. Ajgarally Sarafally AIR 1946 Bom 57; Shidlingava v. Rajava (1930) 33 Bom LR 603.

6 Anto v. Reoti Kuar (1937) All 195 (FB).

7 Gulam Jafar v. Ramdhan AIR 1927 Nag 290; Gulam v. Mir Jakirali (1940) Nag 553; Mohd. Sarder v. Babu Gyanu AIR 1952 Nag 17.

8 Zafir v. Amiruddin AIR 1963 Pat 108; Ali Mohammad v. Ramniwas AIR 1967 Raj 258; Lakshmi Amma v. Kunhi Bava (1967) KLT 203; Rashid Ahmed v. Amina Begum PLD 1968 Lah 1045; Relumal v. Huzur Baksh AIR 1947 Sind 179; Saidu v. Amina (1970) KLT 430.

tried to distinguish the facts of their cases vis-a-vis the fact of Imambandi's case and treat the alienations of de facto guardians as voidable.

In Shidlingava v. Rajava¹ Mudgavkar, J., tried to give a different interpretation to the ruling of Imambandi's case. The learned judge admitted that the mother of a minor had no power as de facto guardian to alienate the minor's property; but he reasoned that this absence of power did not necessarily imply that alienations made by her would be void. On the contrary, he observed, they would be voidable in cases of extreme necessity. The case was, however, decided against the minor on the ground of adverse possession for more than twelve years. A similar view was adopted in Zainuddin Hossain v. Muhd. Abdur Rahim² where a mother executed an ekrarnama on behalf of her minor son without being authorised by the court to do so. In that case Mukerji and Baitley, JJ., referred to Imambandi's case and observed³:

"It is true that under the Mahomedan law a mother has no power as a de facto guardian of her infant children to alienate or charge their immovable property. But it cannot be disputed that if the minor on coming of age ratifies the arrangement or accepts a benefit under it, he would be estopped from questioning its validity".

In Venkatarayudu v. Ayina Khasim Saheb⁴ Owen Beasley, C.J., speaking of the restrictions on the powers of a de facto guardian found that the mother was capable of executing a promissory note on behalf of her minor children in renewal of an existing one. A Division Bench of the Peshawar Judicial

1 (1930) 33 Bom LR 603.

2 AIR 1933 Cal 102.

3 Ibid, 106.

4 (1935) MWN 943.

Commissioner's Court¹ in considering the powers of a de facto guardian was unable to find in Mata Din v. Ahmad Ali² and Imambandi v. Mutsaddi³ any authority for the following sentences used in Mulla's book on Muslim law⁴:

"A de facto guardian has no power to transfer any right or interest in the immovable property of the minor. Such a transfer is not merely voidable but void".

In support of their reason the learned judges quoted the following excerpt from the judgment of Imambandi's case⁵:

"Her own subsequent denial of authority does not affect the purchaser's position; but if the transaction is impugned by the rightful owner, viz., the infant, the onus is on the vendee to establish the foundation of his title, that is, that his vendor possessed in fact the authority under which she purported to act".

And they pointed out that these words appeared to them to indicate that it was the minor who could avoid the transaction and not that the transaction was void as against the whole world.

In Tahad Ali v. Israrullah⁶ Bennet and Verma, JJ., admitted the guardianship of a mother and the legal validity of her transaction of the property of her two minor sons but on a different ground. The necessity or benefit of the minors was not considered. The fact of the case was that

1 Jawahir Singh v. Kohat Municipality AIR 1937 Pesh 74, 75.

2 (1912) 16 CWN 338 (PC).

3 (1918) 23 CWN 50 (PC).

4 Muslim law (17th ed., 1972), 342 sec. 364. See also the argument of Mr. Fida Hussain, the counsel for the appellants, in Gulam v. Mir Jakirali (1940) Nag 553, 555.

5 (1918) 23 CWN 50, 63 (PC).

6 (1939) All 89.

one Q died leaving two sons, A and B, who inherited their father's zamindari property in equal shares. A then died leaving a widow R, two minors V and I, and three daughters, one of whom was N, who assumed the role of next friend of the infant plaintiff, I, in the action. The three daughters relinquished their rights of inheritance in favour of the mother and brothers. In the other branch, B died leaving a son S and a daughter Z and some other daughters who did not claim inheritance. The suit property consisted of two plots of agricultural land. R in her own right and purporting to act as the guardian of her minor sons V, I and S executed a deed of perpetual lease in favour of T, the defendant. Subsequently S and Z executed another deed of lease in respect of the same plots of land in favour of the appellant. I who was minor brought the suit with N as next friend for possession of the plots on the ground that R had no right to transfer any portion of the property belonging to the plaintiff. The learned judges referring to two Privy Council cases¹ observed:

"The settlement of agricultural land within the zamindari belonging to a Muhammadan infant by his de facto guardian with tenants for agricultural purposes does not, in our opinion, come within the rule of Muhammadan law laid down by their Lordships of the Privy Council in the cases mentioned above".

In Abdul Hakim v. Jan Mohammad² Bind Basini Prasad, J., attempted to distinguish Imambandi's case in a convincing way. In this case the minor was the purchaser of half of the

¹ Imambandi's case (1918) 23 CWN 50 (PC); Mohd. Ejaz Hussain v. Mohd. Iftikhar Hussain (1931) 59 IA 92 (PC).

² AIR 1951 All 247.

property and the plaintiff was one of the holders of the other half. The minor exchanged his purchased property with the other holders, and the deed of exchange was executed on the minor's behalf by his grand-uncle. Hence the question was raised by the plaintiff whether the minor's exchange, being executed by a de facto guardian, was void according to the Privy Council decision reported in Imambandi's case. The plaintiff was interested in exercising his right to pre-empt. The learned judge observed that the above Privy Council decision must be interpreted in the light of the case. He pointed out that the real reason for imposing restrictions on the guardian's power of alienation of a minor's immovable property was to conserve it. The learned judge made the distinction on three counts. First, the disputed property in that case was acquired by the de facto guardian for the minor, in the Privy Council case it was inherited from the father. Secondly, the principle of conservation of the property which was the basis of the Privy Council decision was not violated. Thirdly, the minor's interest was not prejudiced by the transaction of exchange. On these considerations the exchange transaction executed by the de facto guardian was upheld in that case.

This decision was followed with approval by a Division Bench of the Saurashtra High Court in Haji Abdulla v. Daud Mahomed¹. Baxi, J., in delivering the unanimous judgment of the Bench held that a mortgage by a de facto guardian

¹ AIR 1953 Saur 84.

resulting in the enlargement of a minor's estate was binding on the minor. In this case the minor and his de facto guardian equally owned a half share in a property. The other half held by their cousins was also purchased by them, and in so purchasing some of the properties held by the minor and his guardian was mortgaged to raise money, the minor being represented by his de facto guardian. By this purchase the minor's share in the whole property along with his guardian was enlarged. The mortgagee brought the suit. The trial and the first appellate courts rejected the plaintiff's claim to a decree against the minor's interest on the ground that under Muslim law a de facto guardian has no power to transfer any right or interest in the immovable property of the minor. In the light of the Supreme Court decision in Mohd. Amin's case this decision may seem to be erroneous, but it is not injudicious, and more so, it is fully in accordance with the basic principle of guardianship, i.e., the benefit of the minor.

In a recent case¹ of the Kerala High Court Madhavan Nair, J., in considering the validity of a de facto guardian's dealing with his minor wards' immovable property held that such dealing was only voidable at the instance of the minors and was ratifiable by them after they become major. A year after this decision was confirmed in Lakshmi Amma v. Kunhi Bava². In this case one A mortgaged his property to M who assigned his interests to K, whose widow U acting for herself

1 Abdul Sukkoor v. Muhd. Dirar (1966) KLT 605.

2 (1967) KLT 203.

and as guardian of her two minor children, released the property to A which she was alleged to have been incompetent in Muslim law to do. Relying on Zainuddin Hossain v. Muhd. Abdur Rahim¹ Madhavan Nair, J., remarked that the learned judge of the Supreme Court in Mohd. Amin's case did not go further to say that alienation by a de facto guardian could not be ratified by the minor if he was pleased to do so. He distinguished Imambandi's case as one in which no ratification by minors on their attainment of majority was ever alleged and in which the minors did not appear to have attained or entered appearance in the suit. On this ground he did not consider Imambandi's case as an authority for the statement that 'a sale by a de facto guardian of the minor's property cannot be ratified by the minor on attaining majority'.

The above two decisions were overruled by a Division Bench of the same High Court in Saidu v. Amina² where Raman Nayar, C.J., in delivering the judgment observed:

"There could be no ratification of the sale of immovable property of a Mahomedan minor by a so-called de facto guardian. A de facto guardian is not recognised by the Mahomedan law. He is a rank outsider".

The facts of the case are not given in the judgment, but the main question which was involved was whether the sale of the immovable property of a minor by his de facto guardian, in this case the elder brother, could be validated by the minor by ratification on attaining majority. The

1 AIR 1933 Cal 102.

2 (1970) KLT 430, 435.

learned Chief Justice followed the decisions in Imambandi's and Mohd. Amin's case. But his views about fuzuli sale that the owner or proprietor by whom the fuzuli sale would be ratified must be sui juris, i.e., person with contractual capacity, cannot be accepted. Muslim law fuzuli sale is a class by itself. Moreover the learned Chief Justice was more intrigued with the idea of a uniform Civil Code for India than with the welfare of the minor.

2.6. Modern Muslim society and the need for de facto guardianship

The legally depressed position of women¹ in early Muslim society did not allow mothers to act as de facto guardians of their minor children. The fundamental cause of a man's superiority over woman is the man's spending money on woman²; but that condition has changed now in the present society. Women are almost equal earners with men. Today they are no more in the pardah. They can now aspire to hold any position in the society if they have the necessary qualifications for it. They are participating in programmes of national development and holding responsible key posts like professors, doctors, bureaucrats, ambassadors and even judges³. Kemal Faruki observes⁴:

1 John L. Esposito, 'Women's rights in Islam', in (1975) 14/2 Islamic Studies, 99-114.

2 The Koran, IV. 34. "Men are in charge of women, because Allah has made them to excel the other, and because they spend of their property (for the support of women)".

3 S.A. Raza, 'Modern reforms in Muslim family laws', in (1974) 13/4 Islamic Studies, 235-252, 243.

4 'Orphaned grandchildren in Islamic succession law', in (1965) 4/3 Islamic Studies, 253-274, 254.

"The socio-economic structures of Muslim groups have been undergoing great, indeed unavoidable, changes. The change from a pastoral or agricultural to an increasingly industrial economy, the growing concentrations of people within large impersonal cities and the movement of people from place to place, as their occupations demand, far from their ancestral homes --- all these factors have tended to make the larger family of the past less meaningful as a social unit. Indeed the process has gone to the extent of making even the close, immediate family a much looser bond in some parts of the world".

In this changed conditions of society and its families should the old law and the rules unduly deduced therefrom decide the capacity of mothers and others when they are acting as de facto guardians purely for the welfare and benefit of the minors? Or should they be reformed? Nothing can stand on the way to reforms, for the immutability of the sacred Divine law, as the Muslim law is, is now used to reforms¹. The law of guardianship should be considered in the light of the new social set-up, and it should be changed for a situation in which the benefit and welfare of a minor would be well protected. As far back as in 1938 Stone, C.J., and Clarke, J., visualised in Gulam v. Mir Jakirali² a situation where a minor's land might be needed to be sold for its sustenance, but glibly as they indicated the way to empower a de facto guardian to effect such sale, it is not

1 J.N.D. Anderson and N.J. Coulson, 'Islamic law in contemporary cultural change', in (1967) 18 Saeculum, 13-92; N.J. Coulson, 'Islamic family law, progress in Pakistan', in J.N.D. Anderson, ed., Changing law in Developing Countries, 240-57; M.I. Zagday, 'Modern trends in Islamic law in the Near, Middle and Far East', in (1948) 1 Current Legal Problems, 206-221; J.N.D. Anderson, 'Muslim personal law in India', in Narmada Khode, ed., Readings in uniform Civil Code, 41-61.

2 (1940) Nag 553.

easy to obtain it. They said¹:

"We desire to add however that it is manifest that cases could arise when for the mere sustenance of a Mahomedan minor it would be necessary to sell his land and we apprehend that this practical difficulty is overcome by the fact that a de facto guardian has power in such circumstances to sell the land with the authority of the court. It is only necessary to go to the court and get authority and then the matter falls within paragraph 264 of Mulla".

The learned judges did not consider that the geographical factors of India are quite different from those of Europe². The judicial systems of the countries in the Subcontinent are complex³ and longdrawn⁴. The consideration of an application for the appointment of a guardian may outlive its utility and exigency, and sometimes may even outweigh in finance the value of the property to be alienated⁵.

As seen earlier Muslim law is not opposed to the consideration of necessity⁶. Ameer Ali observes⁷:

"When a person died intestate without appointing an executor and no reference is made to the kazi,

1 (1940) Nag 553, 557.

2 Derrett, Critique, 186 para 235. The writer says: "In Europe, after all, one does not have to derive for a week through swamps or sail along or wade across streams or rivers or struggle across mountains in order to obtain a District Judge's order ...".

3 In an interview with George Evans, Mrs. Gandhi, Prime Minister of India, says: "Our legal system is complex". The Sunday Telegraph, October 12, 1975, page 7.

4 See Pakistan Law Reform Commission 1958-59 Report, ch. X, page 59. It is stated in the Report: "Cases have been known, where parties to a litigation, have died during the pendency of the case after years of travail without having seen the end of their labours".

5 Derrett, Introduction, 87 para 112.

6 Hedaya, 608.

7 Mahomedan law Vol. 1 (4th ed., 1912), 689.

one of the neighbours (ahl-al-mahalla) may lawfully administer 'according to necessity'. And Fatwa is on this".

Although the specific fatwa is not referred to by the writer, it is admitted that according to necessity even an outsider can lawfully administer a minor's estate. Again, the guardianship of the mother and her capacity to appoint others as guardian of her minor children is not wholly denied by the Shafi school¹. The de facto guardians should be allowed to deal with the minors' immovable properties where such dealings are essential for the necessity and benefit of the minors. The executor of the father or mother of a minor may sell the minor's landed property or akar for the (a) necessity, (b) benefit, or (c) payment of revenue or ancestral debts of the minor. So also for the necessity, benefit or welfare of the minor his de facto guardian should be allowed to deal with the minor's immovable property, and no 'positive obligation' should be cast upon him to seek appointment by the court. Among the de facto guardians the mother's position is admittedly superior to other relations², and she should be given the status of a legal guardian as in Hindu law.

2.7. Initiative for the change of Imambandi's rule

The change of the Privy Council rule in Imambandi's case has become due in all the three countries of the Sub-continent, viz., India, Pakistan and Bangladesh. The rule

1 See Yahya ibn Sharaf, Minhaj et Talibin [Tr. by E.C. Howard], 169. At this page the sentence "A mother can never be the guardian in her own right but the father may appoint her by will" carries a mark which indicates that there are contrary authorities of repute.

2 See Hedaya, 609. An uncle cannot lawfully hire his minor nephew out in service, but the mother can do so.

being that of a Privy Council, its change may be effected either by the highest court of the concerned country or by its parliament. The respective Supreme Courts of the three countries should take the lead. They cannot avoid it by merely saying that they are not to legislate or by referring to the principle of stare decisis. They can do it¹; and a Privy Council rule which has outlived its utility in the society and creates only hardship to the parties, cannot claim to be respected and followed². The process of overruling an old rule may require time, because the courts can do it as and when a fit case comes before them. Parliament may also effect this change, but there must be a public demand for the change. Derrett observes³:

"There is a more difficult task of adopting a legal rule for the solution of a technical problem, particularly a problem which recurs none too frequently, in which no public demand manifests itself, and there is no stable and ancient local precedent to serve as a guide ... the legal draftsman rightly prefers not to depart lightly from what his countrymen have lived with and by for many years without notable discomfort. Naturally it seldom happens that the rules are introduced rashly and inconsiderately; without a demand for a change the old rule, however antique, deserves to remain undisturbed".

The general people are less concerned and they understand little the technical application of the rules of law;

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- 1 See Sir A. Denning, The changing law (London: 1953), 45. The writer says: "Lawyers are taught, from their youth up, that judges do not make or alter the law, but only expound it. The judges themselves have fostered this belief. If they are invited to amend or extend existing rules, they often say 'we are not here to legislate' as if that were itself an answer to the invitation. The truth is that they do every day make law, though it is almost heresy to say so".
- 2 Derrett, Critique, 401 para 514. See also Asma Jilani v. Govt. of the Punjab PLD 1972 SC 139, 169 per Hamoodur Rahman, C.J. The learned Chief Justice observes: "Law cannot stand still nor can the courts and judges be mere slaves of precedents".
- 3 'Commorientes', in (1962) 20/1 University of Ceylon Review, 55-83, 55.

on their behalf the vigilant Bars should raise demand and persuade the parliaments to introduce bills replacing the old rule.

In Pakistan and Bangladesh where the majority of the population is Muslim and where there is no immediate prospect for a uniform Civil Code, or even if there be any that will be Islam based, the Bars should put demand for the change on the parliaments. It is not for the first time that the parliaments of these countries are introducing reforms in Muslim law. In 1961 by direct legislation they reformed Muslim law¹. In the meantime the Supreme Courts of these countries should, if proper cases come before them, recognise the powers of de facto guardians in accordance with the principle of necessity and benefit of the minors. According to the doctrine of Qiyas the courts can come to their own conclusions by the process of Istihad by departing from a principle which is not directly based on the Koran. They should not be unnecessarily conservative as the Madras High Court appears to have been from its following remarks²:

"We have ... to administer without in any way circumventing or deviating from the original texts, the law, as promulgated by the Islamic law-givers to suit the present-day conditions; and in doing so, it has to be remembered that courts are not at liberty to refuse to administer any portion of those tenets even though in certain respects they may not sound quite modern".

The Lahore High Court has shown a just and bold attitude in this respect by rebutting the age old hizanut rule³. In

1 The Muslim Family Laws Ordinance (Ordinance 8), 1961.

2 Veerankutty v. Kutti Umma (1956) Mad 1004, 1009.

3 Munawar Jan v. Mohd. Afser Khan PLD 1962 Lah 142; Zohra Begum v. Latif Ahmad Munnawar PLD 1965 Lah 695, 702.

Zohra Begum v. Latif Ahmad Munnawar¹ Yaqub, J., emphatically observed:

"I am fortified in this view by the instances in which a Qazi finding hardship in the application of a rule of law to which the parties belonged sent the case to the Qazi of another school of which took a liberal view of the matter".

Indeed the Koran itself has ordained the Muslims to deal equitably towards the minors and solely for their welfare².

The same may also be said about India³; and there is an added advantage to effect this change. Codification is in progress in India; Article 44 of the Indian Constitution provides for a uniform Civil Code. Therefore the framers of the Code can easily accommodate provisions for empowering the de facto guardians to alienate the property of the minors. There is, however, one fundamental problem in India, the Muslims being the minority there, any change or reform initiated by the majority may not be always welcome⁴. It is a general psychological factor that whenever a community based on a particular religion is in minority, it becomes too much touchy specially in matters of its religion. Any effort to effect a change in their religion-based law by the ruling majority is, no matter however much beneficial it might be to them, looked with suspicion and often leads to violence unless the ground is properly prepared by making the minority

1 PLD 1965 Lah 695, 702.

2 The Koran, IV. 127.

3 See Derrett, Religion, 513-554.

4 Ziya-ul-Hasan Faruqui, 'Indian Muslims and the ideology of the secular state', in D.E. Smith, ed., South Asian Politics and Religion, 138-149; Derrett, Religion, 534-38; Mohammad Ghouse, Secularism, Society and Law in India (Delhi: 1973), 227-233.

feel its need not by force, but by constant persuasion. The judiciary, and not the parliament where the people's representatives are more politically motivated to fan fire from a dying spark to their own advantage than to the good of the general people, may bring changes in Muslim law by 'juristic tricks' to be ultimately legislated by the parliament. Changes initiated in this way by the judiciary in a country which consists of people of different religions may avoid double defects of a legislation direct by the parliament, viz., political manoeuvring of religion by the privileged few, and the harshness of untrials imposition of a sudden piece of legislation¹.

¹ Derrett, 'A Hindu judge's animadversions on Muslim polygamy', in (1970) 73 Bom LR (Jour), 61-63. See also Derrett, 'The Indian Civil Code or Code of family law: practical propositions', in Narmada Khodie, ed., Readings in uniform Civil Code, 21ff.

C H A P T E R V

LIMITATION

1. Issues involved

We have seen in chapters 2 and 3 that a guardian may alienate a Hindu minor's property for the latter's necessity or benefit of his estate, and we have also seen that if such alienation is not for either of the two alleged purposes, the minor may repudiate the transaction either through the court or merely by conduct, such as ignoring the alienation by making a subsequent alienation. This repudiation raises two opposing issues, namely, first, from the minor's point of view, why should the minor be bound by an alienation of his property which has been made for no benefit of his, and why should he not recover his own property; and secondly, why should an innocent purchaser part with his honestly purchased property, and why should he suffer for no fault of his own? Much as a minor's property needs to be protected, an honest purchaser needs also to be protected. No doubt, the law of guardianship has developed on the principle of 'welfare of the minor', but justice does not demand that this welfare should be gained at the expense of honest men. The issues are so delicately interwoven that, it seems, one cannot be solved without expense to the other. Indeed it is very difficult to reconcile the two objects. For a harmonious solution of them, legislatures, the Benches and the Bars of

the under-developed Common-law countries have always been making an effort. In Civil-law countries there is hardly any scope for such conflict, since there is little feeling in Civil law for a bona fide purchaser from a person standing in a fiduciary relation to the minor. In brief, an incompetent transfer is void and one deals with a 'trustee' at one's peril. In Civil law there is no such distinction between legal and equitable estate or ownership as in English law. Unlike trust in English law, fideicommissum¹ in Civil law does not conceive of double estate or double ownership²; under it the ownership of the fideicommissary begins where the ownership of the fiduciary ends. Lee observes³:

"It will be observed that in Justinian's law there was no tender regard for a bona fide purchaser from a fiduciary, though at an earlier period in Roman law he was preferred to the fideicommissary. The modern law seems to have reached the same result in the case of a purchaser who without notice of the fideicommissum has obtained registered transfer of land or delivery of movables".

Legislators by limiting the period of time within which one must seek the help of the court to establish one's right or regain possession, if the property is encroached upon or adversely possessed by another or others, have long since been (amongst their more obvious aims)

1 Fideicommissum may be described as testamentary trust. See R.W. Lee, An Introduction to Roman-Dutch law (Oxford: 5th ed., 1953), 374.

2 Lee, op cit, 374.

3 Ibid, 382.

reconciling these issues. Statutes of limitations contain provisions for such reconciliation. In this chapter we will endeavour to show how far the law of limitation has been successful in bridging the two issues, and, if necessary, we would suggest what alterations and improvements the present statutory law needs. But before going into the details we like to point out some of the dichotomies that are being maintained in the working of the Limitation Acts, specifically Act 9 of 1908 and Act 36 of 1963 which are followed at present in the Indian Subcontinent, the former in Bangladesh and Pakistan, and the latter in India. Both the Acts provide that where immovable property is in the possession of the transferor, and the relief sought is to set aside the alienation, the limitation period is six years (in Pakistan and Bangladesh) under Art. 120 of the Act of 1908, but three years in India under Art. 113 of the Act of 1963. Where the alienee is in possession and the plaintiff sues to set aside the alienation the period is twelve years under Arts. 126 and 144 of the Act of 1908 and Arts. 109 and 65 of the Act of 1963. The position of a minor is peculiar. If the alienation is effected by a de jure guardian Art. 44 of the Act of 1908 provides that a period of three years runs from when the ward attains majority, when the suit is by a ward to set aside a transfer of property by his guardian. The same is basically the rule under Art. 60 of the Act of 1963 (on which see *infra*, 482, f.n. 2).

On the other hand if a de facto guardian is judicially construed not to be 'guardian' within the meaning of Art. 44/60, the suit cannot be governed by that Article, but must fall under the residual Articles referred to above, so that the ward, to recover immovable property, must bring his suit within twelve years. Art. 144 reads:

"144. For possession of immovable property or any interest therein not hereby otherwise specially provided for.	Twelve years	When the possession of the defendant becomes adverse to the plaintiff".
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To the extent that we are concerned with Art. 65 of the Act of 1963 it reads:

"65. For possession of immovable property or any interest therein based on title. ...	Twelve years	When the possession of the defendant becomes adverse to the plaintiff".
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It would not be out of place to point out that all the issues revolve around one big question: is an improper alienation by a guardian void or voidable? Void and voidable

alienations present another question: must a suit be filed for setting aside either of them? In the course of our discussion we will deal with these different dichotomies and show especially the practical effects of both the 'void' and the 'voidable' solution.

2. Concept of limitation

The law of limitation limits the time after which a suit or other proceedings cannot be maintained in a court of justice with respect to a right of ownership; or from a defendant's point of view, it limits or prescribes a time at the end of which persons liable to suit for wrongful possession of other's property would become exempt from answering therein¹. Understood in this sense, of course, limitation will not imply acquisition of ownership by such possessor or possessors, although the owner's right to sue is barred. Ownership can be acquired by what is known as prescription. The law of prescription prescribes the period at the expiry of which a substantive or primary right is acquired or extinguished under certain circumstances. Indeed limitation visualised as creating ownership over other's property is a product of prescription protected by the denial of the owner's right for his indolence. Markby observes²:

"In nearly every system of law it is recognised that, if a person has been in possession of a

1 U.N. Mitra, Law of Limitation and Prescription Vol. 1 (Madras, 6th ed., 1932), 1.

2 W. Markby, Elements of Law (Oxford, 3rd ed., 1885), 264, para 545.

thing, or in the enjoyment of a jus in re aliena for a considerable time, defects in his title or in his manner of acquiring ownership are cured".

In Roman law at a very early date the acquisition of ownership over other's property was recognised under the rule of usucapio; and along with usucapio there grew up another rule called praescriptio. Under this latter rule, if a person sought the protection of the law, he was required to seek it within a certain prescribed period after the cause of complaint had arisen. This praescriptio actually meant limitation. Justinian abolished the distinction between acquisition of ownership by usucapio and praescriptio¹, and writers on Roman law subsequent to the Code dropped the use of the word 'usucapio', and began to imply both limitation and possession by the term 'praescriptio'². Prescription in this latter sense was adopted by almost all systems³ of modern world⁴.

In English law Coke defined prescription as the acquisition of title by length of time and enjoyment⁵. Most English lawyers used the term in a still more limited sense, viz., as denoting that branch of prescription⁶ which deals

1 Markby, Elements, 266 para 551.

2 Ibid, 267 para 554. For prescription in dharmaśāstra see R. Lingat, The Classical Law of India (London: 1973), 160-65.

3 Chinese law had no rules of prescription till 1930. See Tien-Hsi Cheng, 'The development and reform of Chinese law', in (1948) 1 Current Legal Problems, 170-187, 178.

4 Maine, Ancient law (10th ed., 1885), 288.

5 Coke upon Littleton, 114b.

6 For various divisions of prescription see Salmond, Jurisprudence (London: 12th ed., 1966), 435ff; Paton, Jurisprudence (Oxford: 4th ed., 1972), 501 ff.

with acquisition of easements and other incorporeal heritable rights¹. It was laid down by them as a general rule that acquisition of ownership in land by prescription was unknown to English law². Markby disagreed with this view and pointed out that though the form of English legislation had been a bar to an action of prescription and though the principle of acquisition of ownership in land by possession had nowhere been directly affirmed, such acquisition appeared always to have been there. He observed that the practice of renewing from time to time the periods of limitation for the recovery of land which was the bar to the acquisition by prescription, was afterwards discontinued and a general period of twenty years was fixed by 32 Hen. VIII, c. 2, and 21 Jac. I, c. 16. These Statutes themselves assisted in acquiring ownership by adverse possession, if the possessor could keep the property in his possession for the prescribed period; but they did not expressly extinguish the owner's right. This law was amended by 3 and 4 Will. IV, c. 27 which avowedly extinguished the right as to real property after twenty years' adverse possession which was further reduced to twelve years by 37 and 38 Vict., c. 57³.

U.N. Mitra observed⁴ that in British India attempts were made by Sir James Colvile in 1859 and Sir James Fitzjames Stephen in 1871 to introduce an express law for

1 Wilkinson v. Proud (1843) 11 M & W 35, 37; 152 ER 703, 706.

2 Markby, Elements, 267 para 554.

3 Ibid, 268 para 556.

4 Limitation and Prescription, 16.

acquisition by prescription of ownership in corporeal property, but Act 14 of 1859 and Act 9 of 1871 were passed only after the clauses relating to such acquisition had been expunged from the Bills as introduced.

3. Short history of the limitation statutes in India

Prior to 1859 when only a uniform law of limitation for all the courts in British India was passed, there were different systems of limitation law in different Presidencies and even in different courts in the same Presidency. Section 14 of Regulation 3 of 1793 prohibited the zillah and city courts, to which the jurisdiction of the courts of Dewany Adawlut was extended for the trial of civil suits in the first instance, from hearing, trying or determining the merits of any suit whatever against any person or persons, if the cause of action accrued previous to the 12th August, 1765, the date of the East India Company's accession to the Dewany of the provinces of Bengal, Behar and Orissa, or any suit whatever against any person or persons if the cause of action arose twelve years before the commencement of any suit on account of it; unless the complainant can show, by clear and positive proof, that he had demanded the money or matter in question, and that the defendant had admitted the truth of the demand, or promised to pay the money; or that he directly preferred his claim within that period, for the matters in dispute, to a court of competent jurisdiction to try the demand, and shall assign satisfactory

reasons to the court why he did not proceed in the suit; or shall prove that, either from minority or other good and sufficient cause, he had been precluded from obtaining redress.

Subsequently the provisions of this section were extended to other provinces as well¹. Then Regulation 2 of 1805 was passed 'to explain the existing limitation of time for the cognisance of suits in the civil courts of justice; to provide further limitations with respect to certain suits, regular and summary; and to make other provisions, relative to the admission and trial of original suits, and appeals'. In its preamble this Regulation after referring to earlier Regulations declared that "the period of twelve years, adopted in all these provisions, appears to have been established when the administration of civil justice was first committed to the servants of the Company, on the institution of courts of dewanny adawlut in the year 1772". In the plan for the administration of justice then proposed by the committee of circuit, which was adopted by Government on the 21st August 1772, it was remarked that "by Mahomedan law, all claims which have lain dormant for twelve years, whether for land or money, are invalid: this also is the law of the Hindoos, and the legal practice of the country". We will see in a moment that this observation was not correct with respect to the pre-British Hindu and

1 This Regulation was extended to the Province of Benares by section 8 of Regulation 7 of 1795, and to the Ceded Provinces by section 18 of Regulation 2 of 1803 with the substitution of the dates of the Company's acquisition of the particular province or provinces for the date of Regulation 3 of 1793.

Muslim law. Whether previously established or not, the rule having been in force for over thirty years the framers of the preamble thought it improper to abrogate it. Then the reason to increase this period to sixty years for suits and claims for the recovery of public rights and dues was given. It was stated that this period, too, was recognised by the provisions of Hindu law in regard to individuals and that it was not incompatible with those of Muslim law.

The above Regulations were meant for specified areas. The Madras Regulation 2 of 1802 was passed for 'establishing and defining the jurisdiction of the courts of adawlut, or courts of judicature, for the trial of civil suits in the first instance, in the British territories immediately subject to the Presidency of Fort St. George'. Section 18 of this Regulation gave a law of limitation similar to that contained in section 14 of the Regulation 3 of 1793. The Bombay Regulation 5 of 1827 was passed for 'defining the limitations as to time within which civil actions may be prosecuted, and containing rules of judication respecting written acknowledgments of debts executed without receipt of a full consideration, also regarding interest, the tendering payment of debts and the disposal of property mortgaged or pledged'.

These Regulations did not apply to the Non-Regulated provinces. So the Punjab Code modified section 14 of Regulation 3 of 1793 and reduced the limitation of actions of

debts or contract, excepting partnership accounts, from twelve to six years. In Oudh certain circular of the Judicial Commissioner were in force before 1859. Again, the limitation law of the Mofussil courts in each Presidency differed from the limitation law applied by the Supreme Courts which were governed by the English law of limitation. For example, the principle on which the English law had been framed, namely, that when the period of limitation commenced to run it did not cease to run, was unknown to the Regulations¹. If the person entitled to seek redress, or the person under whom he claimed, was precluded by any disability from obtaining redress during any part of the period of limitation, whether at its commencement or otherwise, the operation of the rule under the Regulations was suspended and the time during which such disability lasted was excluded in computing the period of limitation². Even where the person entitled to seek redress had ceased to be a minor at the time of her death, her son, if a minor, was entitled to a deduction of the periods of his own as well as his mother's minority. Limitation operated when the mother attained her majority, but was again suspended during the son's minority³.

1 See Sir James Colville's speech, Proceedings of the Legislative Council of India (1855) Vol. 1, 543-554.

2 Troup v. East India Company (1857) 7 MIA 104 (PC).

3 Amritolall v. Rajonee Kant (1874-75) 2 IA 113, 123 (PC).

The Supreme Courts in the three Presidency-towns adopted the English law of limitation as contained in 21 Jac. I, c. 16, and 4 Anne, c. 16. It was sometimes held that under 21 Geo. III, c. 70, sec. 17, the Hindu law of limitation was applicable in cases of contract between the Hindus and not the statute 21 Jac. I, c. 16¹. But subsequently it was determined by the Calcutta Supreme Court that the English law of limitation as a part of the lex fori was applicable to the Hindus and Muslims as well as the Europeans in civil actions in the Supreme Court².

The anomalous situation of having different codes for different courts in the three Presidencies led to the passing of the Act 14 of 1859. The Act was passed 'to amend and consolidate the laws relating to the limitation of suits', and it was laid down in the Act that 'no suit shall be maintained in any court of judicature within any part of the British territories in India in which this Act shall be in force, unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature, any law or Regulation to the contrary notwithstanding'³. The operation of this Act was postponed by two subsequent Acts, viz., Act 11 of 1861 and Act 14 of 1862. This Act was hardly in force for ten years when Act 9 of 1871 was passed with the object of introducing amendments

1 Kistno Chunder Sircar v. Ramdhone Nundy (1834) Morton's Rep. 345; 1 ID 1102 (OS).

2 Beerchund Podar v. Ramanath Tagore (1849) 1 Taylor & Bell 313; 2 ID 344 (OS); Ruckmaboye v. Lulloobhoy Mottichund (1851-52) 5 MIA 234 (PC).

3 Sec. 1, Act 14 of 1859.

mainly suggested by the decisions of the courts upon Act 14 of 1859, and of facilitating the application of the law by a tabular statement of the different sorts of suits and of certain applications, of their respective periods of limitation, and of the exact points of time from which such periods were to run. The Judicial Committee of the Privy Council remarked that Act 14 of 1859 was an 'artificially' drawn statute¹, and Act 9 of 1871 was a 'more carefully drawn statute'². Act 9 of 1871 was shortly replaced by Act 15 of 1877 which could be said to be an elaborate and improved edition of the former. Act 15 of 1877 was repealed by Act 9 of 1908. The Select Committee observed that the objects of Act 9 of 1908 were 'to consolidate the law, which at present is scattered throughout a series of enactments, to clear up some points of doubt on which conflicts exist between various High Courts, to make some amendments which are ancillary to the Code of Civil Procedure Bill lately passed by Council, and to remove the hardship caused by a recent decision of the Privy Council in regard to the period of limitation for certain suits on mortgages'³. The Privy Council decision referred to is that in Vasudeva v. Srinivasa⁴ where their Lordships held that Article 147 of Act 15 of 1877, providing a period of sixty years, was applicable only to suits on English mortgages

1 Delhi and London Bank Ltd. v. Orchard (1877) 4 IA 127 (PC).

2 Maharana Futtehsangji v. Dessai Kullianji (1873) 1 IA 34 (PC).

3 For the Report of the Select Committee see the Gazette of India, 1908, part V, 223; see also R. Pal, The Law of Limitation in British India (Calcutta: n.d), 13.

4 (1907) 34 IA 186 (PC).

and that suits for sale on other mortgages should be governed by Article 132 which provides a period of twelve years. This Act was subsequently amended by a host of Acts¹. In Bangladesh and Pakistan this Act is still in force, but in India it was repealed and replaced by Act 36 of 1963. In India the new Act was passed 'to consolidate and amend the law for the limitation of suits and other proceedings and for purposes connected therewith'.

3.1. Law of limitation under sastric Hindu law

Sastric law is of interest because it gives some slight indication of the pre-1772 (or in Bombay State pre-1819) practice of the Hindu public. It recognised that long standing adverse possession of one's property by another would create title in that property in favour of the latter. Thus Brihaspati observed² that in immovable property obtained by partition or purchase, or inherited from the father, or received from the king, a title was gained by long possession and lost by silent neglect. Even in property simply obtained with or without a fair title, which a man had accepted and quietly possessed unmolested by another, he acquired a title, and in like manner he forfeited one by silent neglect. Brihaspati further observed³ that a possession by strangers who are related to one another in the degree of a sapinda

1 Act 17 of 1914; Act 18 of 1919; Act 26 of 1920; Act 10 of 1922; Act 11 of 1923; Act 12 of 1923; Act 30 of 1925; Act 1 of 1927; Act 9 of 1927; Act 10 of 1927; Act 1 of 1929; Act 21 of 1929 etc.

2 Bri. IX. 5 and 6; SBE Vol. 33, 310.

3 Bri IX. 10-12; SBE Vol. 33, 310-11; Digest Vol. 3, 443 (v. 396).

for three generations would give them an absolute title, but a very long and quiet possession by friends, relatives and kinsmen or by sons-in-law, learned Brahmins, the king or his ministers would acquire no title. Adverse possession could not, however, be exercised over, or it would not give the possessor a title in 'an object given as a pledge, boundaries (sima), the property of a child, a deposit, a loan (upanidhi), women, the property of the king or srotriyas'¹.

Katyayana said² that 'in cases falling within the memory of man, it is desirable that possession must be accompanied with title in order to be proof of ownership as to land; but in cases beyond the memory of man possession extending over three generations in succession is independent and valid proof of ownership, since there is no certainty that there is no title'. Yajnavalkya limited the period for adverse possession to twenty years. So he said³ that he who saw his land possessed by a stranger for twenty years, without asserting his own right, lost his property in them, except in pledges, boundaries, sealed deposits, the wealth of idiots and minors, things amicably lent out for use, and the 'property belonging to sovereigns, women, or learned Brahmanas'. Vyasa said⁴ that 'occupancy during twenty years,

1 Nar. I. 81; Bri. IX. 13; Manu VIII. 149; Derrett, Bharuci Vol. 2, 139; Lingat, Classical law, 160.

2 Katya. 321; Kane, Katyayansmrti, 178.

3 Yajn. II. 24-25; Digest Vol. 1, 185 (v. 113).

4 Digest Vol. 3, 443 (v. 395).

unmolested by the owner, is considered as possession of land during one generation; twice as much during two; thrice as much during three; and in this instance proof of a fair title is not required'. Manu¹ made a distinction between movable and immovable property and said that in the case of the former if the adverse possessor could enjoy and retain it for ten years, and if the owner was neither an idiot or a minor, the owner would not be able to recover it by law; on the contrary, the adverse possessor would acquire title in it. Narada said² that if a man though capable of proving his claims to a property omitted to prove it for twenty or ten years after the plaint had been lodged by him, his declaration became futile in consequence.

Strange remarked as follows on this subject³:

"Vijnanesvara, after a long argument, rules, that it is the perishable produce only of land that cannot be recovered after the expiration of twenty, and of other property after ten years, such land, or other property, having been enjoyed to the exclusion of the owners, by his default, or in his view. With regard to land, he holds that, if legal acquisition can be disproved, even after the expiration of a hundred years, considered as the measure of the life of man, ownership is not established by possession; and he accordingly declares, that 'even beyond the period of memory, if there exist a current tradition of the illegality of the acquisition, the enjoyment is not valid'. And it is observable, that, to render it so in any case, it must have been in view of the owner. In fact, according to the original and correct doctrine of the Hindu law, enjoyment or possession can never be cause of ownership, it is

1 Manu VIII. 147-48. See also Derrett, Bharuci Vol. 2, 139; Gau. XII. 37; Vas. XVI. 16-18; SBE Vol. 14, 18.

2 Nar. (Quotations) II. 21; SBE Vol. 33, 239.

3 Strange, Hindu law Vol. 2, 26.

a presumption of it only; but, if the want of original title can be shewn, the possessory holder may, at any time be divested of the property. This applies not merely to land but to property of every description".

(The underlined words are in italics in the original)

U.N. Mitra¹ believes the above remarks to be more accurate exposition of sastric law on acquisition of ownership over property, movable and immovable. Lingat has given a valuable discussion of all this² following Derrett³.

3.2. Law of limitation under pre-British Muslim law

Unlike Hindu law in Muslim law there was no rule of limitation to bar a claim of right⁴. Macnaghten said⁵ that in the Buhroorayig an opinion was cited from Mubsoot to the effect that if a person causelessly neglect to advance his claim for a period of thirty-three years, it should not be cognizable in a court of justice, but it was observed that this opinion was adverse to the recognised legal doctrine. According to Abu Hanifa and one tradition of Abu Yusuf, even as to the right of pre-emption there is no limitation as to time. This rule is equally maintained in the Hedaya⁶ and the Fatwa-i-Alamgiri⁷, and it seems to be the most authentic

1 Limitation and Prescription, 23. Kane has adverted to the divergent opinions of the sages and nibandhakars as to the length of possession that would constitute ownership, but has made no comment of his own. See Katyayansmrti, 177 f.n. of verse 318.

2 Classical law, 161-165.

3 Religion, 138-146.

4 Macnaghten, Moohummudan law, 76 prin. 1. See also Govind Dayal v. Inayetullah (1885) 7 All 775, 811 (FB).

5 Moohummudan law, 76 f.n.

6 Hedaya, 551.

7 Baillie, Digest Vol. 1, 492.

and generally prevalent doctrine¹. The British Indian courts began to apply the limitation law as contained in the Regulations to the Muslims². But in Khanam Jan v. Jan Beebee³ the court did not refer to limitation law and simply held that a claim to inheritance could be preferred at any time subsequent to the death of an ancestor without limitation. However, in Mahomed Danish v. Chooraz Gaze⁴ the court specifically stated that the limitation for the institution of suits, prescribed by the Regulations could not be curtailed or extended by any special limitation or exemption from limitation which could have been declared by the Muslim or Hindu law in particular cases.

3.3. General object of limitation statutes

In Trustees of Dundee Harbour v. Dougall⁵ the House of Lords observed that all statutes of limitation had for their object the prevention of the rearing up of claims at great distances of time when evidences were lost; and that in all well-regulated countries the quieting of possession was held an important point of policy. Story said⁶:

"The object of a statute of limitation is to fix certain periods within which all suits shall be

1 W.M.Bourke, Law of Limitation in India (Calcutta, 2nd ed., 1868), 9.

2 Zureenah Beebee v. Khajah Ali (1820) 3 SDA (Sel. Rep) 43 (NE); Shumsoon-nissa v. Tunnoo Beebee (1836) 6 SDA (Sel. Rep) 68 (NE).

3 (1827) 4 SDA (Sel. Rep) 43 (NE).

4 (1851) SDA 292 (Beng).

5 (1852) 1 Macq. HL 317, 321. See also A'Court v. Cross (1825) 3 Bing 329, 332-333; 130 ER 540, 541 per Best, C.J.; R.B. Policies at Lloyd's v. Butler (1950) 1 KB 76, 81-82.

6 J. Story, Conflicts of Laws (Boston: 8th ed., 1883), 793-794, sec. 576.

brought in the courts. A statute of limitation is a statute of 'repose to quiet titles, to suppress frauds, and to supply the deficiency of proofs arising from the ambiguity and obscurity, or antiquity of transactions'. It discourages litigation, by burying in one common receptacle all the accumulations of past times which are unexplained and have now from lapse of time become inexplicable".

Indeed unlimited and perpetual litigation disturbs the peace of society and leads to disorder and confusion. A constant dread of judicial process and a feeling of insecurity retard the growth or prosperity of a nation, and labour is paralysed when the enjoyment of its fruits is uncertain. It is in the interest of the community ut sit finis litium, that the possibilities of litigation should be limited and restricted¹. And the law of limitation does this.

4. Limitation Acts and their provisions relating to computation of period of limitation in the case of minors

Until avoided, a minor would be bound by the completed acts of his guardian. Thus on attaining majority he must decide whether he would ratify or avoid the alienations of his property effected by his guardian. He cannot sleep over an alienation for an indefinite period of time after his attainment of majority and then institute a suit to set it aside for its being improper or unauthorised, even if the law sympathises with his minority². Modern statutes

¹ Pal, Limitation, 64; Mitra, Limitation and Prescription Vol. 1, 26.

² Bacon observed:

"The rights of infants are much favoured in law, and regularly their laches shall not be prejudicial to them, upon a presumption that they understand not their right, and that they are not capable of taking

of limitation therefore contain provisions providing the period of time within which a minor must bring a suit to set aside an unauthorised alienation. The minors being legally disabled persons, in all limitation Acts the provisions relating to computation of period of limitation are provided under the sub-title 'legal disability'. Thus in computing the period of limitation in the case of persons who were legally disabled at the time when the cause of action first accrued Act 14 of 1859 provided in its section 11 as follows:

"If, at the time when the right to bring an action first accrues, the person to whom the right accrues is under a legal disability, the action may be brought by such person or his representative within the same time after the disability shall have ceased as would otherwise have been allowed from the time when the cause of action accrued, unless such time shall exceed the period of three years, in which case the suit shall be commenced within three years from the time when the disability ceased; but if, at the time when the cause of action accrues to any person, he is not under a legal disability, no time shall be allowed on account of any subsequent disability of such person or of the legal disability of any person claiming through him".

This Act adopted for the first time the principle of English law that 'legal disability' to be effectual as an exception must exist at the time when the cause of action

(contd) notice of the rules of law, so as to be able to apply them to their advantage. Hence, by the common law, infants were not bound for want of claim and entry within a year and a day, nor are they bound by a fine and five years' non-claim, nor by statutes of limitation, provided they prosecute their right within the time allowed by the statute after the impediment removed". [M. Bacon, A New Abridgement of the Law (London: 6th ed., 1807) Vol. 3, 587; and in 7th ed., 1832 Vol. 4, 348. See also King v. Dilliston (1688) 3 Mod 221, 223; 87 ER 142, 144; Ramana v. Babu (1914) 37 Mad 186, 190.

accrued¹. The Act deemed 'married women in cases to be decided by English law, minors, idiots, and lunatics' as persons under legal disability²; but it did not define the term 'minor'.

Act 9 of 1871 became more specific in providing law regarding the computation of limitation period in the case of disabled persons. It provided the law in two sections, viz., sections 7 and 8 with illustrations appended for the first time to section 7. Section 7 runs as follows:

"If a person entitled to sue be, at the time the right to sue accrued, a minor, or insane, or an idiot, he may institute the suit within the same period after the disability has ceased, or (when he is at the time of the accrual affected by two disabilities) after both disabilities have ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed. When his disability continues up to his death, his representative in interest may institute the suit within the same period after the death as would otherwise have been allowed from the time prescribed therefor in the third column of the same schedule.

Nothing in this section shall be deemed to extend, for more than three years from the cessation of the disabilities or the death of the person affected thereby, the period within which the suit must be brought".

Section 8 runs as follows:

"When one of several joint creditors or claimants is under any such disability, and when a discharge can be given without the concurrence of such person, time will run against them all; but where no such discharge can be given, time will not run as against any of them until they all are free from disability".

1 Guz Behary Singh v. Mussamut Beebee Washun (1864) WR 302 (CR).

2 Sec. 12.

This Act defined a minor to mean a person who had not completed his age of eighteen years¹; it excluded the English law applicable to married women from the enumeration of persons under legal disability. Section 8 provided for the first time that when a person was capable of giving discharge on behalf of and without the concurrence of a minor as joint creditor or claimant, time would run against the minor if discharge was given by that person. But if such person was not capable of giving such discharge, time would not run against the minor until he was free from disability or where there were more than one minors all were free from disability.

Act 15 of 1877 made section 7 of Act 9 of 1871 more exhaustive and provided in it the law applicable in the case where a person would suffer from double and successive disabilities, and also provided the law applicable in the case of the disability of a minor's legal representative. It stated for the first time that this section would not be applicable to suits to enforce rights of pre-emption. Section 8 of this Act brought about a meaningful change in the last portion of section 8 of Act 9 of 1871. Section 7 of Act 15 of 1877 states:

"If a person entitled to institute a suit or make an application be, at the time from which the period of limitation is to be reckoned, a minor, or insane, or an idiot, he may institute the suit or make the application within the same period,

1 Sec. 3.

after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed.

When he is, at the time from which the period of limitation is to be reckoned, affected by two such disabilities, or when, before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period after both disabilities have ceased as would otherwise have been allowed from the time so prescribed.

When his disability continues up to his death, his legal representative may institute the suit or make the application within the same period after the death as would otherwise have been allowed from the time so prescribed.

When such representative is at the date of the death affected by any such disability, the rules contained in the first two paragraphs of this section shall apply.

Nothing in this section applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby the period within which any suit must be instituted or application made".

Section 8 of Act 15 of 1877 states:

"When one of several joint creditors or claimants is under any such disability, and when a discharge can be given without the concurrence of such person, time will run against them all; but where no such discharge can be given, time will not run against any of them until one of them becomes capable of giving such discharge without the concurrence of the others".

Besides the above additions and alterations in sections 7 and 8, this Act introduced for the first time a new Article in its second schedule, viz., Article 44 under which a minor who wanted to set aside an improperly effected 'sale' by his

guardian, was required to institute the suit within three years from the date when he attained majority. But the Act omitted the definition of the word 'minor' as provided by Act 9 of 1871 and followed the definition as supplied by the Indian Majority Act (Act 9) of 1875.

Act 9 of 1908 brought no change in the provisions of the sections but it rearranged the sections and divided section 7 of Act 15 of 1877 into two sections and numbered them as sections 6 and 8. Section 8 of Act 15 of 1877 was numbered as section 7 in the present Act with some changes in the first portion of the old section to avoid the conflict between different High Courts¹. Whitley Stokes suggested² that the word 'sale' in Article 44 of Act 15 of 1877 should not be understood to imply sale alone; the Article should be extended to mortgages and leases as well. To give effect to this suggestion this Act substituted the words 'transfer of property' for the word 'sale' in Article 44. Under Act 15 of 1877 a suit to set aside a mortgage or lease executed by a guardian used to be governed by Article 91 read with section 7³. At times the conveyance of a minor's interest as mortgagee or lessee was considered as a sale⁴.

Section 6 of Act 9 of 1908 runs as follows:

"(1) Where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the period of limitation is to be reckoned, a minor, or

1 See the Gazette of India, January 4, 1908, part v, Statement of Objects and Reasons, 22-29, especially Notes on clauses, 23-26.

2 Whitley Stokes, Anglo-Indian Codes Vol. 2, 950.

3 Ramanusar Pandey v. Raghubar Jati (1883) 5 All 490.

4 Madugula Latchiah v. Pally Mukkalinga (1907) 30 Mad 393.

insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the first schedule.

(2) Where such a person is, at the time from which the period of limitation is to be reckoned, affected by two such disabilities, or where, before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period after both disabilities have ceased, as would otherwise have been allowed from the time so prescribed.

(3) Where the disability continues up to the death of such person, his legal representative may institute the suit or make the application within the same period after the death as would otherwise have been allowed from the time so prescribed.

(4) Where such representative is at the date of the death affected by any such disability, the rules contained in sub-sections (1) and (2) shall apply".

Section 7 runs as follows:

"Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of such person, time will run against them all; but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased".

Section 8 runs as follows:

"Nothing in section 6 or in section 7 applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period within which any suit must be instituted or application made".

The new Act (Act 36) of 1963 of India has kept the three relative sections as they were in Act 9 of 1908, but

it has made some additions to each of those sections, and has left out all the illustrations of the old sections. Thus in section 6 the new Act has added a new sub-section, viz., sub-section (5) wherein it makes provision for computing the limitation period in the case of the legal representative of a person who died after the cessation of disability but within the period of three years allowed under this section. An important 'explanation' has been appended to this section in which a 'child in the womb' is included within 'minor'. Two 'explanations' are added to section 7 wherein no change is made. In section 8 some constructional changes have been made; otherwise the section is kept as it was under Act 9 of 1908. The illustrations are, however, deleted since the Law Commission thought them unnecessary and sometimes misleading¹.

Section 6 of Act 36 of 1963 states as follows:

"(1) Where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the prescribed period is to be reckoned, a minor or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time specified therefor in the third column of the Schedule.

(2) Where such person is, at the time from which the prescribed period is to be reckoned, affected by two such disabilities, or where, before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period after both disabilities have ceased, as would otherwise have been allowed from the time so specified.

¹ R. Mitra, The Limitation Act (Act 36 of 1963) (Allahabad: 2nd ed., 1967), 247.

(3) Where the disability continues up to the death of that person, his legal representative may institute the suit or make the application within the same period after the death, as would otherwise have been allowed from the time so specified.

(4) Where the legal representative referred to in sub-section (3) is, at the date of the death of the person whom he represents, affected by any such disability, the rules contained in sub-sections (1) and (2) shall apply.

(5) Where a person under disability dies after the disability ceases but within the period allowed to him under this section, his legal representative may institute the suit or make the application within the same period after the death, as would otherwise have been available to that person had he not died.

Explanation --- For the purposes of this section, 'minor' includes a child in the womb.

Section 7 states as follows:

"Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability and a discharge can be given without the concurrence of such person, time will run against them all; but where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased.

Explanation 1 --- This section applies to a discharge from every kind of liability, including a liability in respect of any immovable property.

Explanation 2 --- For the purpose of this section, the manager of a Hindu undivided family governed by the Mitakshara law shall be deemed to be capable of giving a discharge without the concurrence of the other members of the family only if he is in management of the joint family property".

Section 8 states as follows:

"Nothing in section 6 or in section 7 applies to suits to enforce rights of pre-emption, or shall

be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period of limitation for any suit or application".

Article 60 of Act 36 of 1963 corresponds to Article 44 of Act 9 of 1908. The new Act has widened the scope to cover cases when the minor dies before attaining majority or within three years after attaining majority. The period of limitation, however, remains unchanged. Under the new Article in order to set aside a transfer of his property effected by his guardian (1) the minor who has attained majority must bring the suit within three years from the date when he attains majority, or (2) his legal representative must bring the suit (a) when the minor dies within three years from the date of attaining majority, within three years from the date when the minor attains majority or (b) when the minor dies before attaining majority, within three years from the date when the minor dies.

4.1. Sections 6, 7 and 8 and their relation with Article 44 of Act 9 of 1908 or Article 60 of Act 36 of 1963

Sections 6 and 7 are not mutually exclusive; on the other hand, they are supplementary, the latter section supplements the former¹. And section 8 is an exception to sections 6 and 7; it is restrictive of the concessions granted in sections 6 and 7, and actually does not confer any substantive privilege². The right which section 6 gives

1 Rati Ram v. Naidar (1919) 41 All 435, 441.

2 Rangaswami v. Thanavelu (1919) 42 Mad 637 per Oldfield, J.

to a minor, viz., to wait till he attains majority, can be availed of by him if the circumstances mentioned in the first portion of section 7 do not exist, that is, if there is nobody to give a valid discharge on his behalf without his concurrence. If however a discharge can be given without his concurrence, he cannot take advantage of his minority and wait till he becomes a major. In Varamma v. Gopaladasayya¹ Seshagiri Aiyar, J., said that the principle of section 7 was that if there were some persons in existence who were adults and who could have safeguarded the common rights of themselves and others similarly situated, the failure of the persons who were sui juris to litigate the right would start the cause of action not only against themselves but also against persons in similar circumstances. Bhashyam Ayyangar, J., deduced the following propositions from the combined operation of sections 7 and 8 of Act 15 of 1877 in Ahinsa Bibi v. Abdul Kader² in which the right of suit resided jointly in a plurality of persons:

"(a) Such suit cannot be barred in part in respect of some, and not barred in part in respect of the others; (b) if any one of several joint creditors or claimants is under a disability and a full discharge could be given without his concurrence by all or any of the other joint creditors or claimants, the suit will be governed by the ordinary law of limitation and time will run against all; (c) but where no such discharge can be given, time will not run against any of them until all have ceased to be under disability; and (d) if all were affected by disability, time will not run against any of them until all have ceased to be under disability, unless one of them, who in the meanwhile had ceased to be under disability becomes

1 AIR 1919 Mad 911, 922 (FB).

2 (1902) 25 Mad 26, 38.

capable of giving a complete discharge without the concurrence of the others, in which latter case, time will run against all from the time when one of them has thus become capable of giving such discharge".

In English law it was similarly held in Decharms v. Horwood¹ that one coparcener could not sue separately for his portion of rent accruing to him and his fellows. Tindal, C.J., stated the law on the subject as follows:

"The authorities all agree that whatever be the number of parceners, they all constitute one heir. They are connected together by unity of interest, and unity of title; and one of them cannot distrain without joining the others in the avowry ... If they cannot distrain separately, how can they separately claim a portion of the rent from a person who has received it in the character of a trustee? It would be a great hardship on him to be exposed to three actions instead of one. But it might happen that he might have received authority from the other parceners. Inasmuch, therefore, as there has been no division of these rents, nor any agreement by the defendant to hold one third of them separately for the plaintiff, he has no right separately to sue the defendant".

Article 44 was an embodiment of the result of general principles of sections 6 and 8 as applied to a suit brought by a minor after attaining majority to set aside a transfer of his property effected by his guardian. In other words, it was an illustration of a specific cause under sections 6 and 8. In Ramaliah v. Brahmiah² Venkatasubba Rao, J., effectively illustrated the application of this Article in that sense. In showing the scope of the Article the learned judge observed:

"The question is: when does the cause of action arise to set aside the transfer? Does it arise

1 (1834) 10 Bing 526, 529-30; 131 ER 999, 1000.

2 AIR 1930 Mad 821, 823.

aside a sale effected by their mother as guardian during their minority, the suit being brought within three years of the younger brother attaining majority but more than three years after the elder brother came of age, it was held that Article 44 must be read along with sections 6 and 7. As said earlier, section 7 qualifies section 6 and provides that time would run against all the plaintiffs, if they are jointly entitled, even though some of them are minors, when one of them can give a discharge without the concurrence of the persons under disability. Abdur Rahim, J., whose view was upheld by a Bench of three judges including the Chief Justice on Letters Patent Appeal in the above Doraisami's case pointed out that the applicability of Article 44 to a case would not preclude the applicability of the first part of section 7. In Mahabaleshvar v. Ramchandra¹ Scott, C.J., followed the view that section 7 would apply to a case coming under Article 44. The Allahabad High Court, on the other hand, held a different view in Ganga Dayal v. Mani Ram². It was observed in that case that the elder of the two brothers constituting a joint Hindu family was not a person capable of giving a discharge without the concurrence of the other brother within the meaning of section 8 (corresponding to section 7 of 1908 and 1963 Acts) even though they were joint claimants. It is to be noted that in Ganga Dayal's case it was found that the elder brother never acted as the manager. The Privy Council in Jawahir Singh v. Udai Parkash³

1 (1914) 38 Bom 94.

2 (1908) 31 All 156.

3 AIR 1926 PC 16.

appear to follow the view of the decision in Ganga Dayal's case. But it must be pointed out that in the Privy Council case the Hindu father who made the alienation was alive at the date of the suit and the question was whether the suit by the younger son within three years of his attaining majority would become barred although the elder son had attained majority more than three years earlier and had allowed his claim to set aside the alienation to become barred, and it was held that the conduct of the elder son in not contesting the alienation would not bar the claim of the younger son. Therefore, although the Privy Council approved of the decision of the High Court in that case in which Ganga Dayal's case was followed, it is not clear from the facts whether the decision was based upon the question of the incompetency of a manager in such circumstances to give a valid discharge, or on the question of fact whether the elder brother ever acted as a manager at all. But it may be observed that in such cases the Privy Council seems to recognise the joint nature of the cause of action. The Madras High Court took a very clear stand in this respect about the Privy Council decision in Jawahir Singh's case. Thus in Narayana v. Venkataswami¹ where a suit was brought by the younger son within three years of his attaining majority to avoid the sale effected by his father who was alive when the suit was brought, Devadoss and Wallace, JJ., held following Jawahir Singh's case that

¹ AIR 1926 Mad 1190.

the suit was not barred by limitation, although the elder son attained majority more than three years earlier and had taken no steps to question the alienation. Again, in Surayya v. Subbamma¹ where the paternal grandmother alienated as guardian of minor brothers their property and the eldest brother on attaining majority did not institute any suit to set aside the alienation within the time limited by law, Devadoss and Jackson, JJ., held when a suit was brought by the younger brothers to set aside the sale that the suit was barred by limitation. In this case the learned judges followed Doraisami's case, and when the counsel for appellants contended that the authority of Doraisami's case was considerably shaken by the Privy Council decision in Jawahir Singh's case the learned judges disapproved the contention.

4.2. Residuary Article applicable to the alienation of a minor's property

The above limitation provisions are applicable only where a minor is prima facie bound by an alienation of his property made by a person who has legal capacity to do so. Where, however, an alienation is effected by a person who has no legal capacity to do so on the minor's behalf or where it has been done by a legally capable person but in assertion of a hostile title, the minor would, it has been supposed, not be bound by that alienation and he would not be required to set it aside². If the alienee is in possession

1 (1927) 53 MLJ 677.

2 Derrett, Introduction, 82-83 para 105.

of the property so alienated, the minor must get back the possession of his property within a certain specified period of time. Otherwise uninterrupted, peaceful adverse possession by the alienee would create an absolute right in the property in favour of the possessor. Statutes of limitation provide a general residuary Article which requires that for the possession of immovable property or any interest therein for which no specific provision is made a suit must be instituted within twelve years from the date when possession of the alienee becomes adverse to the minor. Under Act 14 of 1859 a suit of this description was governed by clause 12 of its section 1. The period of limitation under that Act would begin to run from the date when the cause of action arose. Under Act 9 of 1871 the provision for such suit was provided under Article 145 of the second schedule wherein the period of limitation would begin to run from the date when the possession of the defendant, or of some person through whom he claims, became adverse to the plaintiff. Under Act 15 of 1877 the law was provided in Article 144 of the second schedule wherein the third column ran as follows: "When the possession of the defendant becomes adverse to the plaintiff". The words "or of some person through whom he claims" of the relevant Article of the previous Act were dropped, since in section 3 of this Act the words 'plaintiff' and 'defendant' were defined to include 'also any person from or through whom a plaintiff derives his right to sue' or 'a defendant derives his liability to

be sued'. This Article 144 of this Act was re-enacted as Article 144 under first schedule of Act 9 of 1908. Act 36 of 1963 has placed this residuary Article along with others under Article 65 of its schedule. The moment from which the period of limitation begins to run has been kept as before. But Article 144 being a residuary Article cannot be resorted to if a specific Article 44 is applicable to a suit. The Limitation Acts recognise the distinction between void and voidable transactions and provide a shorter period of limitation for remedies in respect of the latter¹. Article 44 cannot be evaded by omitting to sue for setting aside a transfer by the guardian and by professing to sue for possession or redemption². The law regards a dealing with the minor's estate by his legal guardian as, in effect, an act of the minor himself through his guardian and prescribes a short period of three years after attainment of majority for setting aside an improper alienation by that guardian. In this regard Article 44 is a bit drastic in its operation and its application is confined to cases of transfer by the minor's 'guardian' only. Article 44 does not differentiate between guardians and wards belonging to different communities. It does not lay down one special rule for a Hindu

1 For example, see Articles 12 and 91 of Act 9 of 1908. These Articles are applicable even in suit for possession of immovable property, if the plaintiff cannot succeed without displacing an apparent title under a court sale or an instrument by virtue of which the defendant is in possession.

2 Madugula Latchiah v. Pally Mukkalinga (1907) 30 Mad 393; Doraisami v. Nondisami (1912) 38 Mad 118; Muthukumara Chetty v. Anthony Udayar AIR 1915 Mad 296; Satyalakshmi v. Jagannadham AIR 1918 Mad 487; Kandasami v. Irusappa AIR 1918 Mad 724; Fakirappa Limanna v. Lumanna AIR 1920 Bom 1 (FB); Arumugam Pillai v. Panayadian Ambalam AIR 1921 Mad 425.

minor and another for a Muslim minor or a minor of another community¹. But at the same time it requires the personal law of the minors to determine who the guardians of a minor are.

4. 3. Disadvantages arising out of treating an improper alienation as either void or voidable

As said at the beginning of this chapter, the solution of the major question whether an improper alienation by a guardian is void or voidable would solve other issues in its way. But either solution would bring some apparent disadvantage for either party, i.e., minor or alienee. For example, if an improper alienation is void apparently the minor's position would be stronger. He would get a limitation period of twelve years to set aside the alienation in contradistinction to three years in the case of a voidable alienation. Even at times he may not even be required to set aside the alienation by instituting a suit, since he can repudiate it by mere conduct, such as by reselling the property; while under such an alienation the alienee would be a mere trespasser in respect of the property he purchased, and would be liable for mesne profits if the minor could successfully oust him. His financial loss would not be recouped from his claim against the guardian; and the claim against the guardian would rarely include the profits he has lost under the void transfer. Under the void transfer the alienee has at least one advantage, namely,

1 Janab Haji Abdul Hamid v. Samsunnissa Begum (1967) 2 MLJ 195, 197.

once the period of limitation is over he becomes an absolute owner of the property by adverse possession. If, however, the alienation is voidable the minor must set aside the alienation within three years to get possession, otherwise his right to sue would be ended, though his ownership would not be lost and long after the termination of the limitation period prescribed for a voidable alienation he can use it as a defence. Under this form of alienation the alienee stands in a financially better position; he will not be liable for mesne profits. Possession under this alienation does not create ownership, until it is continuously exercised for the whole period of adverse possession.

4.4. Time available to a minor or his legal representative

Article 44 of the Limitation Act 9 of 1908 or its corresponding Article 60 of the Limitation Act 36 of 1963 requires that if a minor wants to set aside an improper alienation of his property by his guardian and to recover possession thereof, he has three years from the date of his attaining majority within which he must institute a suit for the same. According to the law of India, Pakistan and Bangladesh¹ a person attains majority on the completion of eighteen years², but except in the case of marriage, dower, divorce and adoption a minor for whose person or property or both a guardian has been appointed under the GWA or a minor of whose property the superintendence has

¹ Derrett, 'Minority in the Indian Subcontinent', in (1975) 35 L'Enfant, Recueils De La Societe Jean Bodin, 395-457, 399.

² Indian Majority Act 9 of 1875, sec. 3.

been assumed by a Court of Wards reaches majority on the completion of twenty-one years. Thus a minor on attaining majority gets a limitation period of three years to set aside an improper alienation of his property. But an ex-minor for a similar act with respect to his property gets, where he is out of possession, twelve years¹ or, where he is in possession, six years² to set aside the alienation. Derrett has rightly pointed out this as an 'unsatisfactory' arrangement of law which should have been the other way round³.

Under section 6 of Act 9 of 1908 or Act 36 of 1963 if a minor dies before attaining majority his legal representative may institute the suit for such alienation within the same period as provided by Article 44 or Article 60 as the case may be, i.e., three years after the minor's death. Where, however, the legal representative himself suffers from any disability, viz., minority, insanity, or idiocy, at the date of the death of the minor, the limitation period starts under section 6(4) from the date when the disability of the representative ceases. But where a minor is member of a joint undivided Hindu family consisting of all minor coparceners, under section 6 the elder coparcener on attaining majority may challenge an improper alienation of their guardian up to the end of the normal period of three years calculated not from the accruing of the cause of action

1 Limitation Act 9 of 1908, Article 126; Limitation Act 36 of 1963, Art. 109; Palania Pillai v. Amjath Ibrahim AIR 1942 Mad 622 (FB); Konnan Sanku v. Parvathi Amma AIR 1963 Ker 249; Bhaqirathi v. Gopal Charan AIR 1972 Ori 206.

2 Limitation Act 9 of 1908, Art. 120; Limitation Act 36 of 1963, Art. 113. *See Supra* 435a.

3 Introduction, 293 para 474.

but from his attaining majority; the failure of the elder coparcener would bar under section 7 the younger coparceners to avoid it on the attainment of their majority. The curious rule of 'overlapping of lives'¹ as is available to an after born coparcener to challenge an alienation of joint family property is not applicable in the case of alienation by a guardian because as soon as the elder brother attains majority guardianship terminates and the elder brother becomes automatically the manager of the family consisting of his other minor brothers. He is expected as manager to avail himself of the opportunity to set aside the improper alienation and if he does not do it, the younger brothers cannot do it.

¹ Derrett says the following about the overlapping of lives:

"After-born coparceners cannot sue to set aside alienations made before their conception or adoption, as the case may be. But overlapping of lives may give this very right to them. If at the time of his conception there existed an unexpired right amongst the coparcenary body to challenge the same alienation, the joint-family property in which he acquired a birthright includes the 'invisible' asset, the property whose alienation could be effectively challenged, an asset which, like an equity of redemption, may turn out to be of great value. The rule is not open to abuse because, although a succession of minors might otherwise extend the period of challenge over a long space of time, it is settled (fortunately, but not very convincingly) that the period of limitation will in no circumstances be extended by this 'overlapping'". [See Derrett, Introduction, 294 para 475. This paragraph has been approvingly quoted by a Full Bench of the Kerala High Court in Kumaraswami Mudaliar v. Rajamanikkam Udayar (1966) KLT 361, 366 (FB). For overlapping see also Ramkishore Kedarnath v. Jainarayan (1913) 40 IA 213 (PC); Ranodip Singh v. Rameshar Prasad AIR 1923 Oudh 52; Dhanraj Rai v. Ram Naresh Rai AIR 1924 All 912; Jowala Singh v. Sant Singh AIR 1932 Lah 605; Visweswara Rao v. Surya Rao AIR 1936 Mad 440, 447; Dharu Indar Pal v. Firm Badri Das Sohan Lal AIR 1943 Lah 281 (FB); Srinivasalu v. Munisami AIR 1943 Mad 378; Devadoss v. Ponnammal (1967) 1 MLJ 171; Venugopalaswamy Varu Temple v. Visweswara AIR 1969 AP 24.

4.5. Twenty-one years is too long a period for minority

As seen above, minors of whose person or property guardians have been appointed or declared by the courts under the GWA or of whose property the superintendence has been assumed by the Court of Wards, attain majority at the completion of twenty-one years; while those whose person or property is not under such guardianship or whose property is not under the superintendence of the Court of Wards, attain majority at the end of eighteenth year. Such duality of law should not be there. At the present society twenty-one years age limit is too long; it should be lowered to the general majority age of eighteen years.

Before the Indian Majority Act 9 of 1875 came into force the age of majority of the Hindus¹ and Muslims² was

1 In Hindu law regarding the age of majority there were two views. According to one view minority terminated at the end of fifteen years [See Macnaghten, Hindu law Vol. 1, 103; Cally Churn v. Bhuggobutty Churn (1873) 10 BLR 231 (FB); Mothoormohun Roy v. Soorendro Narain (1876) 1 Cal 108, 119 (FB); Sattiraju v. Venkataswami (1917) 40 Mad 925, 929]; but according to the other view, it terminated at the end of sixteen years [See Shivji Hasam v. Datu Mavji (1875) 12 Bom HC Rep 281, 290; Shiddeshvar v. Ramchandrarav (1882) 6 Bom 463; Reade v. Krishna (1886) 9 Mad 391, 397].

2 In Muslim law puberty and majority were considered one and the same. [Hedaya, 529 f.n.]. On the attainment of puberty therefore minority terminated [Re Muthu Ibrahi (1914) 37 Mad 567; Niamat Ali v. Ali Raza (1915) 37 All 86, 90]. Among the Hanafis and Shafis puberty is presumed at the expiration of the fifteenth year [Hedaya, 529; Baillie, Digest Vol. 1, 4] and among the Malikis on the completion of the eighteenth year [Ibrahim v. Ibrahim (1916) 39 Mad 608]. According to Abu Hanifa puberty of a boy is established by circumstances or upon her attaining eighteen years of age, and that of a girl, by circumstances or upon her attaining seventeen years of age. With this view his two disciples do not agree. The lowest age of puberty according to its natural signs is twelve years in males and nine years in females [Baillie, Digest Vol. 1, 4 f.n. 5; Sadiq Ali v. Jai Kishori (1928) 30 Bom LR 1346 (PC); Sibt Ahmad v. Amina Khatun (1928) 50 All 733].

determined by the provisions of their respective personal laws and of other communities in India in the absence of their own personal laws, by the rules of English law. In course of time these provisions were modified in certain respects by Regulations and Acts. In Bengal the Bengal Regulation 10 of 1793 limited minority to the expiration of the fifteenth year with respect to both the Hindus and Muslims; but subsequently this limit was raised to the end of the eighteenth year by the Bengal Regulation 26 of 1793. The Bengal Minors Act 40 of 1858 also regarded every person a minor who had not attained the age of eighteen years. In Bombay the Bombay Minors Act 20 of 1864 and in Madras the Madras Regulation 5 of 1804 provided eighteen years as the period of minority. Besides the above Acts, the age of majority was also fixed by other Acts for their special purposes. Thus the Indian Limitation Act 9 of 1871, as said earlier, defined the expression 'minor' as meaning a person who had not completed his age of eighteen years, and in the Indian Christian Marriage Act 15 of 1872 'minor' was defined as a person who had not completed his age of twenty-one years. But in the European British Minors Act 13 of 1874 a person was considered to be a minor who had not completed the age of eighteen years. To remove this diversity as to the age when a person would complete his minority or attain his majority the Indian Majority Act 9 of 1875 was passed.

Twenty-one years' age limit for minority is no doubt an incidence of English statutory law on its counterpart

in India. In neither Hindu nor Muslim law was this age limit ever recognised as the age of minority. In summerising the 'full age' of a person in English law Pollock and Maitland observed¹:

"There is more than one 'full age'. The young burgess is of full age when he can count money and measure cloth; the young sokeman when he is fifteen, the tenant by knight's service when he is twenty-one years old. In past times boys and girls had soon attained full age; life was rude and there was not much to learn. That prolongation of the disabilities and privileges of infancy, which must have taken place sooner or later, has been hastened by the introduction of heavy armour. But here again we have a good instance of the manner in which the law for the gentry becomes English common law. The military tenant is kept in ward until he is twenty-one years old; the tenant in socage is out of ward six or seven years earlier. Gradually however the knightly majority is becoming the majority of the common law. ... In later days our law drew various lines at various stages in a child's life; Coke tells us of the seven ages of a woman; but the only line of general importance is drawn at the age of one and twenty; and infant --- the one technical word that we have as a contrast for the person of full age --- stands equally well for the new-born babe and the youth who is in his twenty first year".

It appears from the above paragraph that the knightly age of majority gradually came to apply to every one. In 1660 abolishing the military tenure Charles II enacted by the Tenures Abolition Act (12 C. II, c. 24) of 1660 that a father could in all cases appoint a guardian by deed or will until his child became twenty-one years of age. Later the courts adopted the practice in cases where the father had omitted to appoint a guardian. In English law the age

¹ History of English law Vol. 2, 438.

of twenty-one continued to be the age of majority until very recently when in 1969 it has been lowered to eighteen by section 1(1) of the Family Law Reform Act of 1969 which implements the recommendation of the Latey Committee on the Age of Majority¹. In discussing the irrelevance of historical causes of the age of twenty-one the Committee aptly remarked²:

"Grotesque as it may seem that the weight of armour in the 11th century should govern the age at which a couple can get a mortgage or marry today, the historical background of a subject does not, of course, necessarily tell us anything one way or the other about its present usefulness. The gradual collapse of the primeval forests into coal may be interesting, but has no relevance to the question of the suitability of coal for today's fireplaces".

In their general conclusions on the age of majority the Committee considered inter alia that:

- (i) the historical causes for 21 are not relevant to contemporary society;
- (ii) most young people today mature earlier than in the past;
- (iii) by 18 most young people are ready for these responsibilities and rights and would greatly profit by them as would the teaching authorities, the business community, the administration of justice, and the community as a whole.

In this perspective it can be said that when the mother-law which once determined twenty-one as the age of majority

1 Cmnd. 3342.

2 Ibid, 22-23.

has been changed and lowered to eighteen, there is no logic to stick to it anymore. Moreover the reasons which the Latey Committee adduced to bring down the age limit apply more forcefully to the youths of the Subcontinent where senses of right and responsibility grow more rapidly with its climate. Again, when the average longevity of the people is within thirties, it is all the more funny to keep a person under legal disability till the age of twenty-one. As in the United Kingdom so in the countries of the Subcontinent the age of minority should be lowered in all cases to eighteen.

Section 4(a) of the HMGA has defined the word 'minor' to mean a person who has not completed the age of eighteen years. Under this Act a minor who has a natural or testamentary guardian attains majority at the completion of eighteen years, and under the Indian Majority Act of 1875 he attains majority at the end of twenty-one years. Pradhan¹ has pointed out that even in the case of minors who have natural or testamentary guardians the HMGA has made no change in the age of majority, because the HMGA deals only with natural and testamentary guardians whose powers come to an end on the appointment of a certificated guardian or on the assumption of superintendence of the minor's property by the Court of Wards under section 3 of the GWA. Thus notwithstanding the overriding effect of the HMGA if a guardian is appointed by the court of the person or property of a minor or if

1 Guardianship, 242-43.

the superintendence of his property is assumed by the Court of Wards, the minor should be deemed to have attained majority at the completion of twenty-one years.

5. Meaning of the phrase 'any person claiming under him'

Before going into the actual discussion whether an improper alienation of a minor's property is void or voidable, we must ascertain the meaning of the phrase 'any person claiming under him' as used in section 8(3) of the HMGA. Section 8(3) provides as follows:

"Any disposal of immovable property by a natural guardian, in contravention of subsection (1) or subsection (2), is voidable at the instance of the minor or any person claiming under him".

According to the above section if a natural guardian disposes of a minor's immovable property otherwise than for the purposes which are necessary or reasonable and proper for realisation, protection or benefit of the minor's estate, or if he mortgages or charges, or if he transfers by sale, gift, exchange or otherwise, the minor's property, or leases it out for a longer period, without the previous permission of the court, the disposition would be voidable at the instance of the minor or 'any person claiming under him'.

In Philipose Thomas v. Gopala Pillai¹ Madhavan Nair, J., said that a person claiming under a minor within the meaning of section 8 of the HMGA must be one claiming under a valid alienation by the minor or in succession to him. Derrett says² that the expression 'any person claiming under him'

1 (1968) KLT 388.

2 Introduction, 82 para 104.

includes not only 'transferees or assignees of the property or of rights therein from the minor inter vivos', but also his legatees and intestate heirs.

Prior to the passing of the HMGA it was held in some cases¹ that the transferee from an ex-minor had no right to set aside an alienation effected by the minor's guardian. It was stated in those cases that where a minor's property was sold by the guardian and the purchaser was in possession of the property, all the interest which the minor possessed in that property was a mere right to sue to have the sale set aside and a transfer of such a right was prohibited by section 6(e) of the Transfer of Property Act (Act 4) of 1882². In Thayammal v. Rangaswami Reddy³ Rajamannar, C.J., said:

"It is well established that the special provision of section 6, Limitation Act confers a purely personal exemption on a certain class of persons, and the exemption as such cannot be taken advantage of by the transferee from the person under disability. It is sufficient to refer to two leading authorities, the decision of the Full Bench of the Calcutta High Court in -- Rudra Kant Surma Sircar v. Nabu Kishore Surma Biswas [(1883) 9 Cal 663 (FB)], and the decision of our Court in -- Rangaswami Chetti v. Thangavelu Chetti [AIR 1919 Mad 317].

It is equally clear from the authorities that when a person entitled to the benefit of section 6, Limitation Act transfers property to another, though the transferee himself may not be entitled to the benefit of that section, a suit could be filed by the transferor and the transferee and such a suit would not be barred, though ultimately the benefit of the decision in the suit would go to the transferee".

1 Jhaverbhai v. Kabhai AIR 1933 Bom 42; Mon Mohan v. Bidhu Bhusan AIR 1939 Cal 460.

2 The section runs as follows:

"A mere right to sue ... cannot be transferred".

3 AIR 1956 Mad 15, 17-18.

The learned Chief Justice further said¹:

"When ... a minor purports to transfer property which had already been alienated by his guardian to another, he cannot convey title to the property as such. He is really transferring his right to recover the properties after setting aside the alienation".

Similarly in Palani Goundan v. Vanjiakkal², Ramaswami, J., held that the right to avoid a guardian's improper alienation was a personal privilege of the minor and it was nothing more than a right to sue. Therefore an alienee from a minor cannot have any title to the property, and the question of setting aside the prior alienation does not arise at all.

But such a view cannot be accepted. There are sound decisions of courts which hold that the minor's right to avoid the transfer by his guardian or to set it aside is a valuable right attached to the property. Derrett says³:

"If the minor dies without avoiding the alienation the general law (apart from the HMGA) provides that the alienation becomes as good as if it had never been subject to a defect, and the right of suit does not pass to the minor's legal representatives. If however he assigns his rights in the property when he reaches majority (for in one view the right is transferable), and then dies, his assignees may apparently sue to set aside the alienation within three years of the minor's attaining majority".

In Kamaraju v. Gunnayya⁴ where a minor's property was sold by his mother as guardian and the minor on attaining majority ignored the sale and resold it to the plaintiff who sued for possession, Ramesam and Coleridge, JJ., held that by selling the property to the plaintiff on the ground

1 AIR 1956 Mad 15, 19.

2 AIR 1956 Mad 476, 480.

3 Introduction, 82 para 104.

4 AIR 1924 Mad 322.

that the prior sale by his mother was not binding on him the ex-minor had chosen to avoid the prior sale and that the plaintiff could sue for recovery of possession of the property without a prayer for setting aside the original sale by the mother. The same view was expressed by Viswanatha Sastri, J., in Palaniappa Goundan v. Nallappa Goundan¹ when the learned judge after referring to the earlier cases in which the minor's right to avoid his guardian's improper alienation was considered to be a mere right to sue, observed:

"I am unable to accept these decisions as embodying a correct statement of the law. There was here a sale of property by the ex-minor and not an assignment of a mere right to sue. No doubt, the vendee from the minor had to sue the previous purchaser from the guardian for recovery of possession of the property, but ... that did not render the sale by the minor a transfer of a mere right to sue. ... It is a right annexed to the ownership of property or an interest in property and is available to the legal representatives of a minor who dies without avoiding the transfer. Where an ex-minor transfers property unauthorisedly sold by his guardian during his minority, he transfers not a mere right to sue but his interest in the property, though a suit may be necessary to avoid the transfer by the guardian and possession of the property from his alienee".

The above two decisions were agreeably cited by Jagannathan Reddy, C.J., and Kumarayya, J., in Nagabhushana Rao v. Gowramma². The learned judges observed³:

"On a review of the various cases cited at the Bar, we are of the view that as the alienations of a de facto manager or guardian are not binding on the minor unless they are for legal necessity or for benefit to the estate. In case the ex-minor transfers his rights in such alienated property it must follow that what he has transferred is not a mere right to sue but his entire rights in the property and his transfer would be binding

1 (1951) 1 MLJ 265, 272.

2 (1968) 2 An WR 57.

3 Ibid, 64.

unless and until it is proved that the alienation by guardian was for legal necessity or for the benefit to the estate or was warranted by the exigencies or necessities of the estate. The prohibition in section 6 of the Transfer of Property Act therefore, has no application as the transfer was not a mere right to sue and therefore the plaintiff's suit could not have been dismissed on that ground".

In Alamelu Ammal v. Krishna Chetty¹ Satyanarayana Rao and Balakrishna Aiyar, JJ., had to consider a case where, on the death of a minor, the reversionary heirs of the minor had brought a suit for setting aside the alienation effected by the guardian of the minor. The suit was filed by the reversioners within twelve years of the date of the alienation but after the expiry of three years from the minor's death. The lower courts held that the suit was barred by limitation, because under section 6(3) of the Limitation Act of 1908 limitation had to be counted from the date of the death of the minor. The learned judges held that Article 44 would apply to the case and in computing the limitation section 6(3) should not be invoked. According to them the three-year period must be counted from the date when the minor would have attained majority had he not died. The reasoning of the learned judges was that a transferee or a legal representative of the minor acquired title to the property subject to the right of the minor's option being exercised within three years from the date of the minor's attaining majority. After referring to certain earlier decisions the learned judges observed²:

1 AIR 1954 Mad 595.

2 Ibid, 587.

"In our opinion, the right which is being exercised by the legal representatives is the right of the minor to avoid the transfer, and stepping into the shoes of the minor he must exercise it within the same period which would have been allowed to a minor had he been alive till he attained majority. ... The same disability must therefore apply to persons claiming through the minor either as transferees or as legal representatives, and they must also exercise the option during that period, namely, within three years from the date when the minor would have attained majority had he been alive".

The learned judges also observed that the right to set aside an alienation for which Article 44 provided the period of limitation was not a 'personal privilege conferred upon the minor under section 6' of the Limitation Act. The views of this case were not accepted as correct in Palani Goundan v. Vanjiakkal¹ where it was thought that the learned judges of Alamelu Ammal's case had merely assumed without a detailed examination of the legal position that a minor's right to set aside the guardian's alienation is heritable and alienable, and that the learned judges dealt only with a matter of limitation. Incidentally, the conflict in judicial decisions regarding the computation of limitation is now resolved by the provisions of Article 60² of the

1 AIR 1956 Mad476, 479.

2 Article 60 runs as follows:

"To set aside a transfer of property made by the guardian of the ward ---

- | | | |
|--|-------------|---------------------------------|
| (a) by the ward who has attained majority; | Three years | When the ward attains majority. |
| (b) by the ward's legal representative --- | | |
| (i) When the ward dies within three years from the date of attaining majority; | Three years | When the ward attains majority. |
| (ii) when the ward dies before attaining majority. | Three years | When the ward dies". |

Limitation Act 36 of 1963. This Article clearly provides for a suit to set aside a transfer of property made by the guardian of a ward not only by the ward himself after attaining majority, but also by the ward's legal representative in a case where a ward dies before attaining majority and also in a case where he dies within three years from the date of attaining majority. The right to sue is now clearly heritable.

Very recently in Amirtham Kudumban v. Sornam Kudumban¹ the following question was referred to a Full Bench of the Madras High Court for decision:

"Whether a transferee from a minor, after he attained majority, can file a suit to set aside the alienation made by the minor's guardian or the said right is one to be exercised only by the minor?"

The facts of the case were that a father sold his minor daughter's property which the latter inherited from her deceased mother. On attaining majority the daughter ignored the sale and herself executed a sale deed in favour of the plaintiff. The plaintiff filed a suit to set aside the previous sale and for the recovery of possession. The learned judges of the Full Bench reviewed the earlier cases and held that the words "any person claiming under the minor" occurring in section 8(3) of the HMGA included any person who derives from the minor the right to avoid the guardian's alienations; he might have derived the right by inheritance, under testamentary disposition, by transfer inter vivos or by devolution by law; but in all the cases he was a

¹ (1977) 1 MLJ 1 (FB).

person "claiming under the minor". The learned judges observed that the right to avoid a guardian's improper alienation was not a minor's personal right to sue, and therefore it did not come within the mischief of section 6(e) of the Transfer of Property Act. They pointed out that according to the plain meaning of section 8(3) of the HMGA a transferee from the minor could not be excluded from the ambit of this provision, and that when the sub-section referred to "any person claiming under the minor", it was presumed that the right to avoid the guardian's transfer was a derivative right claimed as such by anyone else from the minor. It was also pointed out that section 8(3) implied transferees as well as the legal representatives of the minor, and a transferee from a minor should not be excluded from the meaning of the words "any person claiming under the minor". Finally the learned judges observed that the right to set aside the alienation of a minor's property by the guardian was available under section 8(3) not only to the minor himself but also to any person claiming under him which included a transferee from the minor.

6. Meaning of the words 'void' and 'voidable'

In common parlance the word 'void' means an empty space, while in legal parlance, a nullity. In the eye of law a void transaction cannot be of any effect; it is non-existent. Therefore it can be disregarded by the whole world. A voidable transaction, on the other hand, is effective

in law, but is defective in certain respects, and is therefore liable to avoidance by the persons who are affected by it. For example, a fraudulent contract which is not void, but voidable at the option of the person defrauded. In a void transaction neither party is contractually bound, while in a voidable transaction both parties are so bound, and one of them is empowered to disclaim his obligation¹. In Muralidhar v. International Film Co. Ltd.² Sir George Rankin observed:

"The option which characterises a voidable contract is an option either to say 'it shall not be enforceable at all' or to leave it as a good contract enforceable by any party on the usual conditions. ... it is enforceable at the option of one party in the sense that that party may elect to treat it as not binding upon any party".

In classifying agreements and showing their differences Salmond says³:

"In respect of their legal efficacy agreements are of three kinds, being either valid, void or voidable. A valid agreement is one which is fully operative in accordance with the intent of the parties. A void agreement is one which entirely fails to receive legal recognition or sanction, the declared will of the parties being wholly destitute of legal efficacy. A voidable agreement stands midway between these two cases. It is not a nullity, but its operation is conditional and not absolute. By reason of some defect in its origin it is liable to be destroyed or cancelled at the option of one of the parties to it. On the exercise of this power the agreement

1 H.W.R. Wade, 'Unlawful administrative action: void or voidable?', in (1967) 83 LQR, 499 ff, and (1968) 84 LQR, 95 ff; S.N. Jain, 'Is an individual bound by an illegal executive order?', in (1974) 16/2 JILI, 322 ff. [Dr. Jain has evaluated Nawabkhan Abbaskhan v. State of Gujrat (1974) 2 SCC 121 with Professor Wade's materials. His article is a condensed form of Wade's].

2 AIR 1943 PC 34, 39.

3 Jurisprudence (12th ed., 1966), 341.

not only ceases to have any efficacy, but is deemed to have been void ab initio. The avoidance of it relates back to the making of it. The hypothetical or contingent efficacy which has hitherto been attributed to it wholly disappears, as if it had never existed. In other words, a voidable agreement is one which is void or valid at the election of one of the parties to it.... Void or voidable agreements may be classed together as invalid".

The relation between the words 'void' and 'voidable' is succinctly expressed by Pollock and Mulla in the following word¹:

"Whenever one party to a contract has the option of annulling it, the contract is voidable; and when he makes the use of that option that agreement becomes void".

Again they said²:

"The party entitled to set aside a voidable contract may affirm it if he thinks fit. That is involved in the conception of a contract being voidable".

6.1. Is the difference between 'void' and 'voidable' sharp?

If a contract is void, it is a nullity and there is nothing to be affirmed or validated. The difference between 'void' and 'voidable' is very narrow, and may be wiped out at the option of the parties entitled to exercise it. Chitty says³:

"A void contract is strictly a contradiction in terms because if an agreement is truly void it is not a contract. ... It produces no legal effects".

1 Indian Contract and Specific Relief Acts (9th ed., 1972), 456.

2 Ibid, 171.

3 Contract Vol. 1, 15.

Stone, J., observed in Visweswara Rao v. Suryarao¹ that the difference between the terms 'void' and 'voidable' was so little that the courts often overlooked it. According to the learned judge even the Privy Council on certain occasions² had overlooked the strict import of these words.

Since in strict sense a thing cannot be void and valid at the same time, and since 'void' denotes a nullity for all, it is totally non-existent. But whenever the expression 'void as against a person or group of persons' is used, it implies void at the instance of that person or group of persons. In other words, it is voidable; it has existence in the eyes of all; it will be effective unless set aside. For example, void as against K means that only K can treat it as void; in other words, K can avoid it. Strictly speaking it is voidable at the option of K. Section 8(3) of the HMGA provides a clear example of a voidable transaction.

Instances are not rare where violations of mandatory provisions of statutes do not render them void; on the contrary, courts regard them as voidable. Crompton, J., said in Young v. Billiter³ in his interpretation of the provisions of a statute:

"The expression 'void as against the assignees' in section 59 of the 1 & 2 Vict. c. 110 [The Judgments Act 1838, sec. 59 (repealed; see now the Bankruptcy Act 1914, sec. 44)], seems to me clearly to imply that the transaction is to be valid as against the insolvent so as to give

1 AIR 1936 Mad 440, 443.

2 Sahu Ram Chandra v. Bhup Singh AIR 1917 PC 61; Lachman Prasad v. Sarnam Singh AIR 1917 PC 41.

3 (1860) 8 HL cas 682, 697; 11 ER 596, 602.

the creditor a title until it is impeached by the subsequently appointed assignee. The transaction is to be good except against the title to arise in the assignee in the case of subsequent insolvency".

In Hughes v. Palmer¹ Byles, J., observed:

"There are cases innumerable to shew that 'void' may mean 'voidable' or 'void', at the election of the party contracted with, where otherwise the wrongful act of the other party would put an end to the covenant. ... It is past controversy here, indeed it was admitted that 'void' must mean voidable so far as the nonpayment of the instalments is concerned. The bankrupt and his sureties covenant to pay the instalments, with a proviso that, in case of default, the deed, that is, the release, shall be void. That beyond all doubt must mean voidable at the election of the creditors. Some of the acts contemplated are acts to which the debtor may or may not be a party; but the covenant must be read in the same sense in either event. The plain intention of the parties was that the creditors should not be bound by their releases unless the instalments were paid. I think it is impossible to read the word 'void' any otherwise than as voidable at the election of the creditors".

In Re Brall, Ex parte Vorton² Vaughan Williams, J., emphatically asserted:

"I have come to the conclusion that the word 'void' in section 47 of the Bankruptcy Act 1883 [repealed; see now Bankruptcy Act 1914, sec. 42], means 'voidable', and that, consequently, anyone who claims, under a settlement affected by this section, as a purchaser for valuable consideration without notice, has a good title as against the trustee in bankruptcy. It is quite plain that the word 'void' may mean 'voidable', and there are several reasons why it should receive that construction in this Act. The test, to my mind, is whether the object of public policy in view in this section requires the strict construction".

The mandatory form of a statutory provision need not necessarily indicate that any violation of it would imply a

1 (1865) 19 C B (NS) 393, 407-08; 144 ER 839, 845.

2 (1893) 2 QB 381, 384.

nullification. Section 80 of the Code of Civil Procedure (Act 5) of 1908 provides:

"No suit shall be instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left".

The language of the section shows that it is imperative in its import and prohibitory in its expression. But the Privy Council held in Vellayan Chettiar v. Madras Province¹:

"There is no inconsistency between the propositions that the provisions of the section are mandatory and must be enforced by the court and that they may be waived by the authority for whose benefit they are provided. ... There appears to their Lordships to be no reason why the notice required to be given under section 80 should not be waived if the authority concerned thinks fit to waive it. It is for his protection that notice is required; if in the particular case he does not require that protection and says so, he can lawfully waive his right".

Again Rule 7(1) of Order 32 of the CPC provides:

"No next friend or guardian for the suit shall, without the leave of the court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian".

¹ AIR 1947 PC 197, 199.

This rule is also imperative and prohibitory in its wording, but in Gangadhar v. Dattatraya¹ Gajendragadkar, J., with whom Vyas, J., concurred, held:

"An agreement which has been made without complying with the requirements of sub-rule (1) would be binding against all the parties except the minor. The minor is not bound by such an agreement and he can avoid it. ... It seems to us clear that the effect of the provisions of Rule 7 is to make the impugned agreement voidable at the option of the minor. Such an agreement is not void altogether because if it is held to be void, it would be a nullity and it would not bind any parties to the agreement".

Further section 29 of the GWA provides:

"Where a person ... has been appointed or declared by the court to be guardian of the property of a ward, he shall not, without the previous permission of the court, ---

(a) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of his ward, or

(b)

But section 30 of the same Act provides that if a guardian alienates the minor's immovable property in contravention of the above section, such alienation would be voidable at the instance of any person affected thereby.

The interpretation of the above statutory provisions shows that the difference between the words 'void' and 'voidable' is very narrow. The question whether the contravention of a rule would lead to a total nullification of a transaction or only to an invalidation making it voidable at the option of the person prejudiced thereby, depends

¹ AIR 1953 Bom 424, 425.

not on the form but on the purpose of the enactment. If the provision is designed to promote public interests, its contravention would entail a nullification; but if the object is to promote private interests of individuals or group of individuals, its contravention would make the transaction voidable at the option of the person affected thereby¹. How far can this criterion assist us in our guardianship problem? Guardianship, like marriage, partakes of both private and public significance. Where a de facto guardian alienates the property of a minor, the alienation in actual fact involves the interests of the minor alone and so the minor may either avoid or affirm it. Therefore if it adds to the minor's interests, directly or indirectly, and even if any statute calls it void, we may treat a de facto guardian's improper alienation as voidable with all the incidents of a voidable transaction.

6.2. Article 44 of the Limitation Act of 1908 or Article 60 of the Limitation Act of 1963 if read in the light of the above discussion

From the foregoing discussion it would be seen that any attempt to strait-jacket the two terms, 'void' and 'voidable', would be impractical and illogical in cases where individual interests are involved. Therefore the question whether an unauthorised alienation of a minor's property by his guardian would be void or voidable, makes

¹ W.F. Craies, Statute Law (London: 7th ed., 1971), 269; P.B. Maxwell, Interpretation of Statutes (London: 12th ed., 1969), 328.

little difference. When the minor alone is concerned with the limitation, it is up to him either to approve or disapprove it. The end should not guide the beginning, rather the beginning should indicate the end. My contention is that the right of approbating or reprobating must lie with the minor or be exercised on his behalf and this must be our guiding principle through the thick jungle of case-law.

7. Alienations by natural guardians: void or voidable?

7.1. Alienations effected by the guardian specifically as guardian

From the basic rule that a guardian may alienate his minor ward's property for the necessity or benefit of the latter, the courts have developed the principle that an alienation by a guardian, provided he has the capacity to alienate under the personal law of the minor, is valid, if it is for the necessity or benefit of the minor, and if it is not, it is voidable. In Hindu law since Hunoomanpersaud's case an alienation of a minor's property even by his de facto guardian has been recognised as valid, if made for the necessity or benefit of the minor; and the minor would be bound by such alienation. Such an extension is not however recognised in the case of Muslim minors. Their de facto guardians are, as seen in chapter 4, irrationally denied this power, though the socio-economic condition of the minors of the Subcontinent demands it urgently.

We have seen in chapters 2 and 4 the circumstances under which a natural guardian of a Hindu and Muslim minor may effect a valid alienation of the minor's property. If a natural guardian having authority to alienate the property of a minor for proper purposes effects a transfer which is in excess of that authority, it is voidable. When an alienation is voidable, the law of limitation requires that a suit must be brought within three years¹, if the minor wants to set it aside. However much a guardian may have exceeded his powers or otherwise acted improperly, it would be considered acquiesced in by the minor with full knowledge of his rights and all the material facts connected with the transfer, unless it is challenged by the minor, and he would be bound by it. Completed acts of a guardian until avoided must be treated as valid². Following a number of their own cases³ the Madras High Court held in Arumugam Pillai v. Panayadian Ambalam⁴ that a transfer by a guardian, however improper it might have been, was not a void transaction but only a voidable one.

1 Limitation Act of 1908, Article 44; Limitation Act of 1963, Article 60; see also Ramphul Singh v. Degnarain Singh (1881) 8 Cal 517; Ramansar Pandey v. Raghubar Jati (1883) 5 All 490; Bachchan Singh v. Kamta Prasad (1910) 32 All 392; Laxmava v. Rachappa AIR 1918 Bom 180; Ranga-swami v. Marappa AIR 1953 Mad 230; Rabi Narayan v. Kanak Prova Debi AIR 1965 Cal 444; Hiralal Dayaram Patil v. Bhikari Sampat Shinde (1971) 73 Bom LR 481.

2 Trevelyan, Minors, 198; Prosonna Nath Roy v. Afzolonnessa Begum (1878) 4 Cal 523, 525.

3 Ranga Reddi v. Narayana Reddi (1905) 28 Mad 423; Madugula Latchiah v. Pally Mukkalinga (1907) 30 Mad 393; Kandaswami v. Irusappa (1917) 41 Mad 102; Savavadivelu v. Ponnammal (1912) 22 MLJ 404; Satyalakshmi Narayana v. Jagannadham (1918) 34 MLJ 229.

4 (1920) 40 MLJ 475, 476.

In Labha Mal v. Malak Ram¹ dealing with an alienation by a mother which was found to be not supported by any necessity, Shadi Lal, C.J., observed as follows:

"Now, it is beyond dispute that the mother is, under the Hindu law, a guardian of the property of her minor sons; and a conveyance by her is not a void transaction but voidable at the instance of the minors. It is true that the courts below have held that the sale was not for necessity, but that finding does not affect the nature of the transaction, which should be treated as an unauthorised transfer by an authorised guardian. If a sale is effected by a person who is not the minor's guardian either according to his personal law or by appointment by the court, such a sale is a nullity and does not affect the minor's property. If on the other hand, the sale is made by a natural guardian who goes beyond the scope of his authority the transaction cannot be regarded as a nullity and will bind the minor unless he succeeds in impeaching it within the period prescribed by law. There is ample authority for the view that an unauthorised alienation by a guardian recognised by law is voidable and not void".

This decision was followed by another Division Bench of the Lahore High Court in Khusiah v. Faiz Muhammad Khan² where the court observed:

"An alienation by a natural guardian of the minor's property is a voidable and not a void transaction and the fact that it was not for necessity does not alter the nature of the transaction. In other words, it was an unauthorised transfer by an authorised guardian and the limitation to set aside such a transfer is prescribed by Article 44".

The Madras High Court has consistently held that an alienation by a natural guardian which is in excess of his

1 AIR 1925 Lah 619, 620.

2 AIR 1928 Lah 115, 116.

powers, is only voidable¹. Similarly the Calcutta², Bombay³ and other⁴ High Courts also consider an improper alienation of a natural guardian as voidable.

In Rangaswami v. Marappa⁵ an unauthorised alienation of a natural guardian by way of gift was considered as voidable. In that case the mother of a minor son gifted some property belonging to the minor to an unmarried daughter of her husband's senior widow and the question arose whether the minor was required to set aside such a gift within the period mentioned under Article 44 of the Limitation Act of 1908. The minor challenged the gift made by his mother as void and not binding on him. Venkatarama Aiyar, J., followed Palaniammal v. Kothandaraman⁶ and held that though the gift was not binding on the minor, it was nevertheless one which had to be set aside under Article 44 of the Limitation Act. The learned judge remarked⁷:

"Under the law, when a natural guardian having authority to alienate the properties of the

1 Ramaswami v. Govindammal (1928) 56 MLJ 332; Satgur Prasad v. Hari Narain Das (1932) 62 MLJ 451; Palaniappa Goundan v. Nallappa Goundan AIR 1951 Mad 817; Rangaswami v. Marappa AIR 1953 Mad 230; Adimoola Padayachi v. Pavadari Padayachi (1958) 2 MLJ 57; Koya Ankamma v. Kameswaramma (1934) 68 MLJ 87; Sankaranarayana v. Kundasami (1956) 2 MLJ 411 (FB); Janab Haji Abdul Hamid v. Sumsunnissa Begum (1967) 2 MLJ 195; Mohamed Naziruddin v. Govindarajulu (1971) 1 MLJ 28.

2 Sham Chandra v. Gadadhar (1911) 13 CLJ 277; Krishnadhan v. Bhagaban Chandra (1916) 34 IC 188; Brojendra Chandra Sarma v. Prosanna Kumar Dhar (1920) 24 CWN 1016, 1019; Rabi Narayan v. Kanak Prova Debi AIR 1965 Cal 444.

3 Fakirappa Limanna v. Lumanna AIR 1920 Bom 1 (FB); Hiralal Dayaram Patil v. Bhikari Sampat Shinde (1971) 73 Bom LR 481.

4 Pran Nath v. Bal Kishan AIR 1959 Punj 313; Keluni Dei v. Kanhei AIR 1972 Ori 28; Santha v. Cherukutty AIR 1972 Ker 71.

5 AIR 1953 Mad 230.

6 AIR 1944 Mad 418.

7 AIR 1953 Mad 230, 231.

ward for proper purposes effects a transfer which is in excess of that authority it cannot be put in the same position as an alienation by an unauthorised person. An unauthorised alienation by a lawful guardian is only voidable and must be set aside within the time prescribed by Article 44, unlike an alienation by an unauthorised person, which is void under the law and does not require to be set aside under that Article".

The learned judge quoted extracts from the judgments of Labha Mal's and Khusiah's case and referring to their decisions observed¹:

"We are not here concerned with a deed which is void under some other provision of law such as Transfer of Property Act or Registration Act in which case there is in existence no transfer of property and therefore, no question of setting aside such a transfer. But where the transfer is operative and the question is whether it is binding on the ward or not it has to be set aside within the time prescribed by Article 44".

In Commissioner of Agricultural Income Tax v. Jagadish Chandra Sahoo² the Calcutta High Court held that a transfer by way of gift of immovable property, on the basis of a deed of trust, belonging to two minor brothers, by their mother as natural guardian during their minority was not void ab initio, but was merely avoidable at the option of the minor or minors on attainment of majority.

But a different view was expressed by Ansari, J., in Subba Rao v. Ramamurti³. Sitting with Subba Rao, C.J., the learned judge held that an alienation of a Hindu

1 AIR 1953 Mad 230, 232.

2 AIR 1960 Cal 546.

3 AIR 1958 AP 626.

minor's property by way of gift was void as being beyond the competence of the guardian to make it. In that case the adoptive mother of a minor had executed a gift of a land in favour of her brother. The minor on attaining majority filed a suit for the recovery of possession of the property in the hands of his maternal uncle. It was urged before the court that the suit was barred by limitation, being voidable and instituted more than three years after the minor had attained majority. But the learned judges arrived at their decision by observing that there was no semblance of authority for the natural guardian to confer a vested remainder in favour of a stranger. Although it was raised before the court that all unauthorised alienations by a lawful guardian were voidable only, the learned judges based their decision primarily on the rulings of Luchmeswar Singh v. Chairman of Darbhanga Municipality¹ and Rathinasabapathy v. Saraswathi Ammal². These two cases could be distinguished from other cases, The Privy Council decision in the first one was given in the year in which the GWA was passed. The GWA provides in its section 29 that a guardian appointed or declared by the court may inter alia with the previous permission of the court transfer by gift any part of the immovable property of his minor ward. The Privy Council decision has lost its effect after the passing of the GWA, since

1 (1890) 17 IA 90 (PC).

2 AIR 1954 Mad 307.

under the GWA it has been usually presumed that a natural guardian has all the powers which are provided under the different sections of the GWA to a guardian of property, if they are reasonable and proper for the realisation, protection or benefit of the property of the minor. Therefore a natural guardian can make a reasonable gift for the 'protection or benefit' of the minor's property; and as a gift made by a court-appointed guardian without the previous permission of the court is deemed under section 30 of the GWA as voidable, so also the High Courts of Calcutta¹, Bombay², Madras³, Lahore⁴ and Allahabad⁵ begin to look upon an unauthorised alienation by a natural guardian as voidable. Wallace and Thiruvengkatachariar, JJ., of the Madras High Court in Ramaswami v. Govindammal⁶ and Bennet and Iqbal Ahmed, JJ., of the Allahabad High Court in Dipchand v. Munni Lal⁷ categorically stated that as Article 44 of the Limitation Act of 1908 applied to voidable transfers, its application should not be confined to cases of transfers made by certificated guardians alone; it should apply to every case in which a minor on attaining majority impugned the transfer made by his natural guardian

1 Amar Chandra Chakravarty v. Sarodamoyee Debi AIR 1929 Cal 787.

2 Kalu v. Barsu (1895) 19 Bom 803; Tatoba Ganu v. Tarabi AIR 1957 Bom 280.

3 Kandasami v. Irusappa (1917) 41 Mad 102.

4 Imperial Bank of India v. Maya Devi (1934) 16 Lah 714.

5 Saraswati Kuar v. Mahabir Prosad AIR 1928 All 476; Jagesor Pandey v. Deodat Pandey AIR 1920 All 476.

6 AIR 1929 Mad 313.

7 AIR 1929 All 879.

as well. The old distinction between a transfer by gift and a transfer by sale or mortgage is gone, and it is bound to go¹.

In Rathinasabapathy's case, again, the property involved had been the ancestral joint family property and not the separate property of a minor. But for the purpose of limitation it is not necessary for a minor coparcener to set aside an alienation of the family property made by the father-manager or manager only within three years. The minor coparcener may ignore it, and a suit to recover possession of the property is governed by Article 144 and not Article 44². It is all the same to treat the gift of a coparcenary property as void or not, since in either case the minor coparcener's interest in the property is not affected until the trespasser peaceably and uninterruptedly keeps the property under his possession for the statutory period of twelve years³. A Division Bench of the Madras High Court expressed in Eachan Neelakantan v. Kumarasami Nadar⁴ that if the minor's separate property was sold, the transaction would be governed by Article 44, but if it was a conveyance of joint family property by the manager and the minor was made eo nomine a party, the transaction would be governed by Article 144.

1 Derrett, Critique, 187 para 238.

2 Hanumantappa v. Dundappa AIR 1934 Bom 234; Kaka v. Fakir Chand AIR 1934 Lah 601; Chhaju Mal v. Multan Singh AIR 1936 Lah 996; Baidi Singh v. Singrai Murmu AIR 1962 Ori 170.

3 Limitation Act of 1908, Articles 126 and 144; Limitation Act of 1963, Articles 65 and 109.

4 AIR 1964 Mad 353.

The decision in Subba Rao's case cannot be accepted as the correct statement of law. An alienation by a lawful guardian of the property of a minor in excess of his powers as guardian should be treated differently from an improper alienation by a Hindu widow or the manager of a joint undivided Hindu family for the purpose of limitation law. The transfer by a legal guardian is not void as against the minor, but only voidable at the instance of the minor and he must set aside the unauthorised transfer within the three years limited by Article 44 of the Limitation Act of 1908 or Article 60 of the Limitation Act of 1963. The learned judges in Subba Rao's case failed to make the distinction between an unauthorised alienation by a lawful guardian and an alienation by an unauthorised person. This decision came for consideration before a Division Bench of the Kerala High Court in Beeyyathumma v. Moidin Haji¹ where the learned judges did not approve of the decision and held that a transaction by a legal guardian, which was not beneficial to the minors or for which there was no justifiable necessity, was not void but only voidable requiring to be set aside under Article 44.

7.2. Post-1956 natural guardians' alienations

As said earlier in chapter 2 the HMGA has put double restraint on the powers of a natural guardian, namely,

¹ (1958) KLT 602.

first, he must obtain previous permission of the court for any transfer of the minor's property, and secondly, his acts must be for the benefit of the minor. If he does not obtain the first, his alienation would be voidable under section 8(3), and if his act does not comply with the second, he would not obtain the first. By the provisions of its section 8 the HMGA has increased the number of litigations by at least one if not more, once for permission, if it is contested, and again for challenging the transfer, if and when the parties desire it. Consideration of benefit would arise in both cases. Acts which a natural guardian is allowed to do under sub-sections (1) and (2) of section 8 would be voidable under sub-section (3) of the same section, unless done with the previous permission of the court. Even if the transfer is found for the benefit of the minor, the minor may avoid it when it is done without the permission of the court. The well meaning intention of a natural guardian would not save an improper alienation if the minor wants to avoid it. The authority of a natural guardian even to transfer the minor's property for legal necessity has been taken away by the HMGA. The courts have understood the Act in that way¹. In Prabhakaran Pillai v. Kumara Pillai² the Kerala High Court held that a minor was entitled to avoid a transfer effected by his guardian without the prior permission of the court, although the transaction was found

1 Ramchandra v. Manikchand AIR 1968 MP 150, 155; Radhesham v. Kiran Bala AIR 1971 Cal 341.

2 (1971) KLT (SN) 32.

to be beneficial to the minor. Possibly there is little scope for Derrett's query¹; "Does the rule of Hunoomanpersaud's case survive the enactment of the HMGA, at least so far as alienees from guardians are concerned?" The equitable rule of Hunoomanpersaud's case has been abolished by the HMGA as interpreted by the above courts. The right of a bona fide incumbrancer or purchaser for value without notice would now be affected, for want of court's permission. He is only entitled to get back the money he paid for the mortgage or sale of the land². This abolition would no doubt create hardship to the natural guardians and ultimately the minors. Derrett who knows more than any other the different social structures, the socio-economic condition and the mental set-up of the people of the Subcontinent, and who is much acquainted with its nervous judiciaries for their unsocial habit of interpreting statutes strictly to the letter, has expressed³:

"The rule in Hunoomanpersaud's case is of such obvious utility, and has stood the test of time so well, that one can hardly imagine why it should have been abolished in our present context. HMGA ... section 8(3) provides ... that disposals in contravention of section 8(1) or (2) are voidable 'at the instance of the minor or any person claiming under him'. Are we to understand from this that the defendant-alienee cannot plead in his defence that, though there might turn out to have been no such justification as comes within section 8(1) and (2) (e.g. land was sold without the permission of the court), he is protected by having made sufficient bona fide enquiry into the existence of justification, had acted honestly,

1 Derrett, Critique, 191 para 244.

2 Prabhakaran Pillai v. Kumara Pillai (1971) KLT (SN) 32.

3 Derrett, Critique, 191-92 para 244.

and consulted the minor's interests but had been deceived (e.g. by being shown a forged court order purporting to authorise the sale)? In a case where the alienee has used every care are his rights to be postponed to those of the minor in every possible context?"

As the Madras, Calcutta and Kerala High Courts have already held that the HMGA has taken away the natural guardian's authority to transfer for legal necessity, there is hardly anything into which an alienee would make a bona fide enquiry. No doubt, this is a 'considerable departure from the previous law', but nothing could be done without an amendment of the section itself. It would have been nice if the Indian judiciary had worked according to the following suggestion of Derrett¹:

"Altogether it seems better to believe that Parliament intended that in any event alienations of immovable property should be upheld, even if the provisions of section 8(2) were broken, where the alienee could prove that he had made sufficient bona fide enquiry and had been deceived".

Alas, there is every doubt that the judiciary would ever do it!

7.3. Alienations effected not as guardian

Sometimes a natural guardian may alienate the minor's property in his own personal capacity, as if he were the real owner of the property. In such a case the alienation would be void and the minor would not be bound by such

¹ Critique, 192 para 244.

alienation. Mulla says¹:

"No act done by a person who is the guardian of a minor binds the minor, unless the act was done by him in his capacity of guardian. It is a question of fact in each case whether a particular act done by a person was done in his capacity of guardian or on his own behalf and on his own account. In the former case, the act binds the minor, provided it was otherwise within the power of the guardian; in the latter case, it does not. The mere fact that the name of the minor is not mentioned in a contract, or in a deed of sale or mortgage, is not conclusive proof that the transaction was not entered into on behalf of the minor".

Derrett observes²:

"... if the alienation is a transfer in assertion of a hostile title, for example as if the property were his or her own, or where property in which the minor has an interest is alienated by the guardian otherwise than as guardian, or gratuitously or with a fictitious consideration, the transaction is void, this statute is not called into play, and the minor or his heirs may ignore it as an absolute nullity until a title to it is perfected by adverse possession on the part of the possessor, who is, of course, a mere trespasser".

Where there is an alienation of a minor's property by his guardian the minor becomes eo nomine a party to that contract, but if the guardian alienates the property under an assertion of a hostile title the minor does not become a party to that alienation, because the guardian then acts in his own personal character and not in the character of a guardian representing the minor. Derrett has said³ that "it will never be presumed that the guardian assumed proprietorship if his action can possibly be

1 Hindu law (14th ed., 1974), 583 sec. 529.

2 Introduction, 82-83 para 105.

3 Critique, 189 para 241.

construed more favourably to him". It should be followed with caution. The courts should not extend their presumption too far, as the Bombay High Court once did in Murari v. Tayana¹. In that case the mother of a minor executed a sale deed in her own name without mentioning the name of the minor in the deed. The court held that though the sale deed did not purport to be on behalf of the minor it would nevertheless be binding on him as it was the intention of the mother to deal with the interest of the minor. The court put reliance on decisions in which alienations by managers of joint Hindu families were upheld when they were for proper purposes. The correctness of this decision was doubted by the Madras High Court in 1953 in Rangaswami v. Marappa². The Bombay High Court itself even did not follow this decision in its subsequent cases. Thus in Nathu v. Balwantrao³ where the mother alienated a property on the footing that it belonged to her and not to the minor, and with the sale proceeds discharged debts binding on the minor, when the minor after attaining majority challenged the alienation the court held that the sale was not binding on him. In Balwant Singh v. Clancy⁴ a similar matter came before the Privy Council. Although Balwant Singh's case related to the powers of a manager of a joint Hindu family, the High Courts began mostly to follow this

1 (1896) 20 Bom 286.

2 AIR 1953 Mad 230.

3 (1903) 27 Bom 390.

4 (1912) 39 IA 109 (PC).

decision in guardianship cases. The facts show that the elder of two brothers asserted that their family estate was impartible and as such descended to him as absolute owner and that his brother was entitled only to an allowance for maintenance. In the assumed position of the absolute owner of the impartible estate he purported to mortgage certain villages belonging to the family to secure sums of money borrowed and applied (even) in discharge of the debts contracted by his father. The question of these debts being binding on the younger brother under joint-family law was not pursued. The younger brother also signed the mortgage deed but it was found that at the time of the transaction he was a minor. It was contended on behalf of the mortgagee that in making the mortgage the elder brother must be deemed to have acted as the manager of the family for the benefit and protection of the estate and that consequently the younger brother's share in the family properties would be bound by the mortgage whether or not the latter was of full age at the time of the transaction. Their Lordships rejected this contention on the ground that the elder brother could not (on the facts as proved) be supposed in the circumstances of the case to have acted as the manager of the joint family. This Privy Council decision was followed by the Madras High Court in Ammani Ammal v. Ramaswami Naidu¹ and the Allahabad High Court in Nandan Prasad v. Abdul Aziz². Referring to these two cases

1 (1919) 37 MLJ 113.

2 (1923) 45 All 497.

Patanjali Sastri, J., in Muthiah Chettiar v. Rayalu Ayyar¹ remarked:

"In all these cases it was observed that the transferor was really asserting an absolute title to the property in himself adversely to another person and could not, therefore, be considered as having represented that other person in making the transfer, for the position assumed by the former was quite inconsistent with any intention to act on behalf of the latter whose interest in the property transferred he was repudiating".

In Rangaswami v. Marappa² where a minor's mother executed a deed of gift of the property inherited by her minor son from his father in favour of the daughter of her co-widow out of affection, the court found the alienation made not as a guardian but in assertion of a hostile title. The alienation being void, the court held that there was no question of any election to affirm or disaffirm it, and that the son would not be precluded from recovering the property merely because he attested the deed.

Having dual personality ---one, his own personal identity, and the other, as representative of the minor --- the validity of a guardian's alienation, as seen above, depends upon the capacity in which he works. Derrett³ has rightly said that "in a great many cases the careless alienee may not know whether the guardian acted irrespective of his powers ... or outside his powers ...". Section 8(3) has not changed the position; it has not relieved the alienees from the evils of being careless. The section

1 (1943) 2 MLJ 548.

2 AIR 1953 Mad 230.

3 Critique, 188-89 para 241.

says that an alienation made without the previous permission of the court would be voidable when the natural guardian is acting in his representative capacity. It has not said anything what would happen if he acts in his personal capacity. So the pre-HMGA situation remains and the alienees should be on their guard.

8. Alienations by de facto guardians: void or voidable?

8.1. Pre-1956 alienations

Earlier in chapter 3 we have seen that in Hindu law¹ the de facto guardian of a minor may alienate the minor's property in case of necessity or for the benefit of the latter; and in this respect his powers are the same as those of a legal guardian. In Ramaswamy v. Kasinatha² a Division Bench of the Madras High Court observed:

"A de facto guardian is under the Hindu law in the same position as the de jure guardian so far at least as acts done by him for the benefit of the minors are concerned and as regards such acts the same test is to be applied as would be applied in case of an alienation by a legal guardian".

Indeed, started with a Privy Council decision and reasserted by a Federal Court decision at an interval of ninety-four years de facto guardianship has proved its necessity to the society, and the assignment of powers equal to that of a natural guardian does not seem to have been unjustified.

¹ Muslim law does not allow a de facto guardian to 'inter-meddle' with a minor's property. See Imambandi v. Mutsaddi (1918) 23 CWN 50(PC).

² AIR 1928 Mad 226.

As seen already, an improper or unauthorised alienation of a natural guardian is voidable and not void. Would the same follow in the case of a de facto guardian's unauthorised alienations? In the 10th edition of his book Mulla says¹:

"An alienation by a de facto guardian, which is neither for necessity nor for the benefit of the estate of the minor, is not void, but only voidable, and it may therefore be ratified on the minor attaining majority".

Derrett in his Introduction to Modern Hindu Law has not specifically said that it is voidable. He has observed²:

"Where the alienation by the de facto guardian was unjustified it was called 'void in toto', but was really inchoate. If the property were in the minor's possession when he attained majority he had only to repudiate the transaction by notice, or by conduct inconsistent with the alienee's title. If it were out of his possession, as is usually the case, he might sue for the alienation to be set aside, for a declaration that it did not bind him, and for possession".

In this regard the courts are not uniform in their decisions. It must be emphasised that the de facto guardian acted in each case as guardian. Much of the confusion was caused by the reliance of the courts on the Privy Council decision in Mata Din v. Ahmad Ali³. Both the Bench and the Bar of the Bombay High Court invariably cited in their judgments or arguments, as the case may have been, the said Privy Council decision whenever any case for setting aside an alienation of a de facto guardian came

1 Hindu Law, 601.

2 Introduction, 87-88 para 114.

3 (1912) 16 CWN 338 (PC).

before the court. None of them considered that the Privy Council case was a Muslim law case, and that there was difference between the powers of a Muslim de facto guardian and a Hindu de facto guardian! In respect of a minor's property the former is a 'wholly unauthorised person', while the latter is, though not an authorised, a recognised person. What is void in the case of a Muslim de facto guardian, is only voidable in the case of a Hindu de facto guardian! If Article 44 of the Limitation Act does not have any application in the case of an alienation by the former, it may have its application in the case of an application by the latter! Since Article 44 was not applied by the Privy Council in the case of the de facto guardian in Mata Din's case, the courts started not to apply it in the case of any de facto guardian. And the acts of de facto guardians which ought to have been voidable because they were done in excess of their recognised authority, began to be looked upon as void requiring not to be set aside by the minors. Indeed the whole confusion started from the use of the words 'unauthorised person' in the case of a de facto guardian in the Privy Council decisions in Mata Din's¹ and Imambandi's² case, and their blind application by unconcious busy judges in the case of Hindu de facto guardians. This resulted in the anomalous situation that in some cases the courts began to assess the validity of

1 (1912) 16 CWN 338, 345.

2 (1918) 23 CWN 50, 59.

a de facto guardian's act not from the competence of the guardian but from the applicability of the limitation Article to his act. The unwisdom of this is apparent.

In Balappa Dundappa v. Chanbasappa¹ a step-mother sold the mortgaged lands of a Hindu minor son. The minor on attaining majority challenged the sale on the ground that it was not for his benefit. The trial and the first appellate courts dismissed the suit as being time-barred under Article 44 of the Limitation Act of 1908. On second appeal the case came before the Bombay High Court where the question for decision was whether Article 44 would apply to the circumstances of the case. Scott, C.J., following Mata Din's case reversed the decisions of the lower courts, and held that Article 44 had no application to the case of a de facto guardian wholly unauthorised to effect a transfer. The learned Chief Justice did not consider the competence of a Hindu de facto guardian.

In Malkarjun Annarao v. Sarubai Shivyogi² without much consideration Divatia, J., unconvincingly came to find an unauthorised alienation by a de facto guardian as void. He observed:

"In the case of a person who is not a manager but a 'de facto' guardian it has been held by a full bench of our High Court in --- Tulsidas v. Raisingji [AIR 1933 Bom 15 (FB)] that such guardian can validly sell the minor's property only for his benefit or legal necessity. It would therefore be void if no legal necessity was proved. It is thus quite clear that if such alienation is made either by a manager of a Hindu family or a de facto

1 (1915) 17 Bom LR 1134.

2 AIR 1943 Bom 187.

guardian of the minor's interest in the property, it is not voidable but void in its inception. If the alienation is made by a natural guardian or a guardian appointed by the court, then only is it required to be avoided within three years attaining majority".

In Tattya v. Rabha¹ where the younger brother impugned the alienation of his interest in the joint family property effected by the elder brother as de facto guardian, a Division Bench of the Bombay High Court observed:

"Apart from authorities, it seems to us that an alienation by a 'de facto' guardian of the minor's property without justifying necessity must be held to be void 'ab initio' ... As stated by their Lordships of the Privy Council in the decision under Mahomedan law (Mata Din's case) the 'de facto' guardian is nothing more than an intermeddler not deriving any authority for the alienation either by natural relationship with the minor or legal authority from appointment by a court. There seems no reason why in such a case the minor should be held bound by the transaction which is not for his benefit and has been entered into by a person who has no semblance of authority to deal with the minor's property".

A similar view had been taken by a Division Bench of the Allahabad High Court in Dip Chand v. Munni Lal². In that case the property of a minor was transferred by a de facto guardian. The court held that the transaction was void ab initio and it was not necessary for the minor in order to recover possession of the property to have the transfer set aside. In this case it should be noticed that none of the cases referred to in the judgment dealt with de facto guardianship.

1 AIR 1953 Bom 273, 276.

2 AIR 1929 All 879.

The Madras High Court meanwhile rightly considered an improper alienation by a de facto guardian as voidable. In Seetharamamma v. Appiah¹ the court rationalistically compared the powers of a de facto guardian with that of a legal guardian, and held that as the powers of a natural and de facto guardian are similar a transaction entered into by a de facto guardian not for necessity was only voidable at the option of the minor. In Adeyya v. Govindu² where the case involved two mortgages of the same property Curgenven, J., agreeably remarked:

"If a de facto guardian, equally with a de jure guardian, can alienate for necessity, it is not very easy to perceive why, if not so supported, the one should be only voidable and the other void. Even to alienate for necessity connotes some power to deal with the property and indeed not only is such a power recognised in a de facto guardian but the view seems to be that in all such dealings no distinction can be drawn between the powers of the two classes of guardians".

The liberal views as expressed in the above two cases were unfortunately not maintained in subsequent cases of this High Court. A restricted meaning was attached to the word 'voidable'. Thus in Purushotama v. Brundavana³ Ramesam, J., classified the suits brought by persons to set aside alienations by their guardians during their minority into the following three categories:

- (1) where guardians are de jure guardians;
 - (2) where alienations are made by de facto guardians;
- and

1 AIR 1926 Mad 457, 459.

2 AIR 1931 Mad 274, 276.

3 AIR 1931 Mad 597, 598.

- (3) where the alienations are made by persons who pretend to be guardians though they are not the real guardian and are only intermeddlers just for the purpose of the transaction.

The learned judge observed that alienations which were made by a de facto guardian during the minority of a minor, were not void but voidable. If they were for justifiable necessity, they could be upheld wholly or partially. Their voidability was allegedly analogous to the voidability of a widow's alienation which could be ignored by reversioners, and a suit could be brought within twelve years under the general law of limitation¹. It was further observed that the word 'voidable' in such cases should not be used in the same sense as it was used in the law of contracts². In Bapayya v. Pundarikakshayya³ Wadsworth, C.J., and Patanjali Sastri, J., held a similar view. The learned judges remarked⁴:

"The test of void or voidable is not always decisive on the question of liability of mesne profits. ... While an alienation by a de facto guardian for necessity has been held to bind the minor, ... he need not sue to set aside an alienation without necessity by such a person within three years of attaining majority, but can sue for possession treating it as a nullity just like a reversioner. ... That is to say, no improper alienation by a de facto guardian is binding on the minor until it is set aside, although it may be voidable in the sense that he may elect either to ratify it or avoid it by treating it as a nullity".

1 On this point the learned judge referred to his own decision in In re Appavu Naicken AIR 1931 Mad 377.

2 In the matter of Arithalinga Tevan AIR 1928 Mad 986.

3 (1946) Mad 648.

4 Ibid, 656-658.

The unfortunate 'turn-about' created in Bapayya's case is not unconnected with the extremely unsuitable analogy with the case of a widow's alienation of the estate she herself fully represented in her lifetime, and the mischievous words have been underlined by me above. An alienation by a de facto guardian was further called 'void' in Rangaswami v. Marappa¹ in contradistinction to voidable alienation by a lawful guardian. The slide into error was steep.

But in Palani Goundan v. Vanjiakkal² the Madras High Court seems to have reverted to its earlier decisions. Without distinguishing the previous cases of their High Court Govinda Menon and Ramaswami, JJ., happily held that when an alienation was made by a de facto guardian ostensibly for necessity or for the benefit of the minor, it was only voidable at the instance of the minor who could repudiate it or more formally challenge it by bringing a suit either through a next friend during his minority or after attaining majority within the period of limitation allowed by law.

Recently in Ranganatha Gounder v. Kuppuswami Naidu³ Ismail. J., treated the alienation of a de facto guardian as void. But the case could be distinguished; the learned judge in that case assumed that a de facto guardian had no power of alienation; the HMGA had taken away all his

¹ AIR 1953 Mad 230.

² AIR 1956 Mad 476.

³ (1976) 2 MLJ 128.

powers. He observed¹:

"The further effect of this Act is that it has taken away the power of any de facto guardian to deal with the property of a Hindu minor, which power was available to a de facto guardian under the prior Hindu law in certain stated circumstances. ... Consequently, ... the alienation ... by the sixth respondent acting as the guardian of her minor children, is wholly void, and, therefore, is not binding on the minor children".

The alienation of a de facto guardian was not recognised even if that was for the necessity or benefit of the minor. In such a case it is not unlikely that a de facto guardian's alienation would be void as it is considered in the case of a Muslim de facto guardian. But if the de facto guardian is still considered to possess his pre-1956 powers, his alienation would be voidable.

The Patna High Court regarded the de facto guardian's improper alienations as voidable in the restricted sense. Relying on Tulsidas v. Raisingji² and Seetharamamma v. Appiah³ Chatterji and Beevor, JJ., in Kailash Chandra v. Rajani Kanta⁴ held that if an alienation by a de facto guardian was not for the benefit of the minor, it was not binding on the latter; but if he chose he could ratify it. Chatterji, J., erroneously, it is submitted, observed that it would be unjustified to extend the analogy that a de facto guardian under Hindu law was in the same position as a de jure guardian so far as acts done for the minor's benefit, to

1 (1976) 2 MLJ 128, 131.

2 AIR 1933 Bom 15 (FB).

3 AIR 1926 Mad 457.

4 AIR 1945 Pat 298.

cases where the alienation by a de facto guardian was not for the benefit of the minor. The learned judge further observed¹:

"The distinction between the powers of the two classes of guardian lies in the fact that while the de jure guardian is under the law clothed with authority to deal with the minor's property, the de facto guardian is not clothed with similar authority, though if the latter alienates the minor's property for his benefit, the court will uphold the transaction. In the case of an alienation by a de jure guardian, not for the benefit of the minor, the guardian acts in excess of his authority derived under the law, whereas in the case of a similar alienation by a de facto guardian, his act is wholly unauthorized. In the latter case, however, the minor may choose to ratify the transaction though it is not binding on him".

In the matter of a de facto guardian's improper alienation the Calcutta High Court followed the Patna High Court. In Pachu v. Hrishikesh² Banerjee, J., observed that a de facto guardian's unauthorised alienations were voidable not in the sense that they would be binding on the minor, but in the sense that he could ratify them. A similar view was held by the Lahore High Court also³.

The whole subject of alienation of a minor's property by his de facto guardian had, however, been exhaustively and authoritatively dealt with and the entire case law had been reviewed by the learned judges of the Indian Federal Court in their individual judgments in Sriramulu v. Pundarikakshayya⁴. In the opinion of the learned judges

1 AIR 1945 Pat 298, 300.

2 AIR 1960 Cal 446.

3 Tapassi Ram v. Raja Ram AIR 1930 Lah 136.

4 AIR 1949 FC 218.

the dealing of a de facto guardian with the estate of a Hindu minor by way of sale or mortgage would be regarded not as void altogether but voidable at the instance of the minor, and the same tests would be applied to determine the validity of such sale or mortgage as are applied in the case of a de jure guardian's sale or mortgage. Yet this admittedly long case has not exercised the influence equal to the pernicious influence of Mata Din's case.

From the decisions of different High Courts three views emerge, Viz., first, improper alienations of de facto guardians are wholly void (!) ; secondly, such alienations are voidable and required to be set aside under Article 44; and thirdly, they are voidable in a restricted sense, that is, if the minor wants, they can be ratified, but they are never required to be set aside. The first and third views maintain a discrimination between the competency of a de facto and a de jure guardian. But such discrimination was never envisaged in the decision in Hunoomanpersaud's case.

In tracing the true scope of the decision in Hunoomanpersaud's case Mahajan, J., observed¹:

"Relations under Hindu law have the right to be appointed as guardians by the court. They are not in a position of utter stranger. The position therefore is that if such persons to whom the law including the statute shows preference in the matter of appointment of guardianship without formally getting themselves appointed by the court, assume, out of affection, charge of the estate of a minor and take upon themselves

1 Sriramulu v. Pundarikakshayya AIR 1949 FC 218, 252-53.

management of it, pay revenues, realize rents, locate tenants, maintain the minor and do all other acts of management and the courts and other relations stand by and recognize them as such, should they be treated as officious intermeddlers with the estate? Can they not be aptly and appositely described as de facto guardians of minor's person and de facto managers of his estate? It was the position of such managers that was recognized in Hunoomanpersaud Pandey's case [(1856) 6 MIA 393], and their acts in the management of the estate, provided they were for the protection of the estate or for the benefit of the minor's estate, were recognized as valid, the test being necessity and not the authority that they possessed".

The Mitakshara texts of verses 1.1.27 to 1.1.29 and also other sastric verses of Bri. XI. 50, Manu VIII. 167, Nar. I. 12, Vish. VI. 38-39 and Katya. 542-543 would show that under the Hindu system persons having no lawful authority or title could effect sales, mortgages and gifts of property belonging to others in certain emergent situations. This kind of power is wholly unknown in other systems of jurisprudence. Probably for this reason de facto guardians in other systems are not allowed to handle minors' property. The helplessness of Indian judges is therefore understandable. In Hindu law a de facto guardian cannot be said to be without any legal coverage, but it lacked the protection, the aegis, of English law, the Indian judiciary's constant prop. In the case of minors it is their necessity and not their relationship that authorises a person to alienate their property; it is not the father-and-son relationship that determines the validity of a

father's transfer of his minor son's property, it is the necessity of the son that determines it. The same is the case when it is done by others. In Hindu law the authority of both a de facto and de jure guardian is derived from necessity, and for this reason where there is necessity the validity of acts of both of them is recognised. It is not correct as the courts usually say that one has legal sanction and the other has not. If the courts consider legal competency as the only point of discrimination between the two classes of guardian, and certainly there is no other discriminating ground, they should place both at par.

The decisions of the two Privy Council Muslim cases, viz., Mata Din v. Ahmad Ali¹ and Imambandi v. Mutsaddi², of the early 20th century have greatly influenced the courts to forget the true character of a de facto guardian in Hindu law, and indeed the general wording of the judgment of Mata Din's case is bound to produce such a situation unless the judge is conscious about the religion of his case. Unscrupulous pleaders could deceive busy judges by simply quoting the words of the Advice to His Majesty. In Hunoomanpersaud's case the mother of the minor did not ostensibly act either as natural or legal guardian but she intruded upon the estate and managed it as if she were a

1 (1912) 16 CWN 338 (PC).

2 (1918) 23 CWN 50 (PC).

guardian of the minor's property or manager of the same. The Privy Council practically uses the words 'guardian' and 'manager of the property of an infant heir' in the same sense. Courts have adopted this principle for a long time and have recognised the powers of a de facto guardian. Though it may be that the powers of a de facto guardian are somewhat limited and qualified, it does not follow that transfers effected by him are ever void. In Imambandi's case the Privy Council held that under Muslim law a de facto guardian of the person or property of a minor had no power to convey to another any right or interest in immovable property which the transferee could enforce against the minor. This decision was according to Muslim law; the parties were Muslims; and the authorities cited were Muslim. So this decision should not be referred to or followed in the case of a Hindu de facto guardian who has an acknowledged traditional authority to deal with a minor's property. But in numerous law reports it would be seen that this case, since it is a Privy Council case, has been considered to determine the authority of a Hindu de facto guardian. Again, in Mata Din's case the Privy Council held that the provisions of Article 44 of the Limitation Act of 1908 had no application to a sale effected not by a guardian, 'but by a wholly unauthorised person'. In Hindu law a de facto guardian, as seen above, is not an unauthorised person like a Muslim de facto guardian. Although statute has not

recognised him, tradition has long acknowledged him. We have seen earlier how the Bombay High Court followed it. So on the basis of Muslim cases of the Privy Council a Hindu de facto guardian should not be called an unauthorised person. Thus the observations made in Hindu cases in which de facto guardians are looked upon as unauthorised persons are open to doubt¹. The unholy differentiation that courts have forged between a de facto and a de jure guardian in the application of Article 44 should go, and unauthorised alienations of both the classes should be treated as voidable. The alienations made by a de facto guardian are to be treated as on a par with those made by a de jure guardian. If they lack justification, they are in both cases voidable. And when they are voidable, the application of Article 44 is an inescapable corollary. It cannot be said that alienations made by de jure guardians are within the Article 44 and those made by de facto guardians are not². In Fakirappa Limanna v. Lumanna³ Shah, J., laid down that all avoidable transactions should be set aside on the principle laid down before Mata Din's case in Malkarjun v. Narhari⁴ and Khizarajmal v. Daim⁵. If that is still to be followed then Article 144 cannot be applied to suits to set aside voidable alienations;

1 See the comments of Parthasarathi, J., in Kasturi v. S.V. Rao AIR 1970 AP 440, 445.

2 cf. Kasturi v. S.V. Rao AIR 1970 AP 440; Aswini Kumar v. Fulkumari Dassi (1972) 77 CWN 349, 354.

3 AIR 1920 Bom 1 (FB).

4 (1900) 25 Bom 337 (PC).

5 (1904) 32 Cal 296 (PC).

Article 44 would apply in the same way as it was done in the case of legal guardians.

In Palaniappa Goundan v. Nallappa Goundan Viswanatha Sastri, J., even held that the word 'guardian' in Article 44 of the Limitation Act must be interpreted as meaning only a lawful guardian and not as including a de facto guardian of a Hindu minor, and in so arriving the learned judge distinguished the Federal Court decision in Sriramulu's case in which a de facto guardian's improper alienation was held as voidable by observing:

"We are, however, concerned in this case with the interpretation of Article 44 of the Limitation Act, though the rules of Hindu law may also have a bearing on the point".

This is, with respect, an altogether perverse approach. Such a distinction does not help achieve the general object of limitation law as a whole, it denies justice and increases the incidence of litigation. It is true that Article 44 does not say anything about de facto guardians, but it is also true that it does not contain any specific word by which to imply a particular class of guardian. There is no definition of the word 'guardian' in the Limitation Act of 1908 or of 1963, but as defined in section 4(2) of the GWA a guardian is only a 'person having the care of the person of a minor or of his property, or of both his person and property'. This is a very general definition and is wide

enough to include along with natural, testamentary and court-appointed guardians de facto guardians as well¹. This definition, if followed by the limitation law, it must be followed with its different shades of interpretation unless it is qualified by any word as in the case of section 21 of the Limitation Act of 1908. Since the word used in Article 44 is a bald one it appears to have been used in the same sense to include all classes of guardians as in the GWA.

8.2. Post-1956 alienations

Earlier in chapter 3 it is seen that after the passing of the HMGA courts in India consider that de facto guardianship has been abolished. Section 11 of the Act is said to contain an absolute prohibition against the transfer of Hindu minor's property by his de facto guardian. The Act has given powers of disposal of a minor's property only to a natural guardian and not to a de facto guardian. Therefore any alienation by the latter is deemed void², and a person claiming under such alienation cannot be considered as one claiming under a minor³. In Ranganatha

1 Noshirwan v. Sharoshbanu (1933) 58 Bom 724, 728; Mst. Prem Kuar v. Banarsi Das (1934) 15 Lah 630; Great American Insurance Co. Ltd. v. Madanlal (1935) 59 Bom 656, 662; Abaji Ganesh v. Damodar AIR 1938 Nag 399.

2 Daneyi Gurumurthy v. Raghu Podhan AIR 1967 Ori 68; Rajalakshmi v. Ramachandran AIR 1967 Mad 113; (1966) 2 MLJ 420; Narain Singh v. Sapurna Kuer AIR 1968 Pat 318; Talari Eruppa v. Muthyalappa AIR 1972 Mys 31.

3 Philipose Thomas v. Gopala Pillai (1968) KLT 388.

Gounder v. Kuppuswami Naidu¹ Ismail, J., observed:

"Section 11 of the Act ... abrogates the power of the de facto guardian to deal with any property of a minor, whether it is an undivided interest in a joint family property or not. Unlike sections 6 and 9, which, while referring to the 'minor's property' expressly state 'excluding his or her undivided interest in joint family property' and 'other than the undivided interest referred to in section 12', respectively, section 11 does not exclude any such undivided interest of a minor in the joint family property from its scope and therefore the incompetency of a de facto guardian to deal with a minor's property extends to all the properties of a minor without any exception".

9. Should a suit be filed to set aside an improper alienation?

Trevelyan says in an oft-cited passage²:

"A transfer which is voidable at the instance of the minor may be repudiated by any act or omission of the late minor, by which he intends to communicate the repudiation, or which has the effect of repudiating it; for instance, a transfer of land by him avoids a transfer of the same land made by his guardian before he attained the age of majority. It is not necessary that he should bring a suit; but a suit to set aside the acts of his guardian during his minority amounts of course to an express repudiation".

Similar to the author's view was the opinion of Jenkins, C.J., in Hem Chandra v. Lalit Mohan³. The learned Chief Justice observed⁴:

"It is not necessary for a person in the position of the defendant to bring an action to set aside the transaction and it is sufficient if he declares his will to rescind by way of defence when an action is brought to enforce the mortgage against him".

1 (1976) 2 MLJ 128, 131.

2 Trevelyan, Minors, 202.

3 (1912) 16 CWN 715.

4 Ibid, 717.

This, of course, is quite another matter. The author's view is applicable in cases where the minor or his transferee is in possession of the property, which may happen either in the case of a simple mortgage or where possession has not been parted with though it ought to have been delivered. In defence he may protect his title, but not otherwise. Where the assistance of the court is necessary for possession a suit must be brought within the period prescribed by Article 44, otherwise title would be absolute with the possessor under section 28 of the Limitation Act of 1908 or section 27 of 1963 Act.

It is seen above that all the courts are unanimous in their finding that an improper alienation by a natural or lawful guardian is not void as against the minor but only voidable¹. If the minor desires to set aside such a transfer, he must bring a suit within three years of his attaining majority under Article 44 and obtain a judicial rescission of the transfer²; he cannot disaffirm it by a mere notice of his intention to repudiate. His right to recover possession of the improperly alienated property would be lost and his title thereto would be extinguished under section 28 on the expiry of the three years' period, if he does not sue to set aside the transfer within that period. Speaking for a Full Bench of the Madras High Court,

¹ See supra, 494-495, 500-501.

² Pran Nath v. Bal Kishan AIR 1959 Punj 313; Rabi Narayan v. Kanak Prova Debi AIR 1965 Cal 444.

Govinda Menon, J., observed in Sankaranarayana Pillai v. Kandasami Pillai¹:

"There is no doubt whatever that a transaction entered into by a guardian relating to the minor's properties is not void and if the minor does not sue to set it aside within three years of his attaining majority it becomes valid under Article 44 of the Limitation Act. In such a case the minor is deemed to be a party to the transaction. But where the document is executed by a manager of the family and it is not binding on the family², the minor or any other member can ignore the transaction and recover possession of the property".

Section 8(3) of the HMGA provides that if a natural guardian alienates a minor's property otherwise than as provided in sub-section (1) or (2) of section 8, the alienation will be voidable at the instance of the minor or any person claiming under him. And since it is voidable the minor must file a suit within three years of attaining majority to set the alienation aside under Article 44 of 1908 Limitation Act or its corresponding Article 60 of 1963 Limitation Act in India. In the case of a natural guardian's improper alienation all the courts were uniform. But recently, very abruptly and unfortunately Krishna Iyer, J., of the Kerala High Court (he is now in the Indian Supreme Court), interpreted the word 'voidable' in the same way as it is being done when used in the case of a de facto guardian's improper alienation, meaning that a minor need not bring a suit to avoid it.

1 AIR 1956 Mad 670 (FB).

2 In passing it is desirable to note that South India understands some acts of the manager as 'void', e.g., unauthorised gifts.

In Santha v. Cherukutty¹ the learned judge held that the transfer of a minor's property by his natural guardian without the sanction of the court was voidable at the instance of the minor and the minor could avoid it by his conduct and without a suit. The facts of the case show that the mother of a minor daughter transferred the minor's property as her natural guardian. After the minor's marriage her husband ignored the transfer as the legal guardian of his minor wife and proceeded to execute a partition decree against the transferee. The transferee raised the defence that unless the transfer was set aside the partition decree could not be enforced. The question that came for decision was whether the transfer effected by the mother as natural guardian could be avoided unilaterally or should it be set aside by a decree if the sale was in contravention of section 8 of the HMGA. The learned judge discussed and distinguished a wide range of cases and observed²:

"It is indisputable that no sanction of the court was taken for the alienation in the present case by the mother acting as the guardian of the minor and, therefore, there is a plain violation of section 8(2) of the Act. Consequently, section 8(3) is attracted and the disposal of the property, even though by a natural guardian becomes voidable at the instance of the minor. Should this process of avoidance be effected by a suit to set aside the alienation, or is it enough if the minor repudiates the transaction by his own act? I have considered this question in an unreported decision in S.A. No. 683 of 1969 (Ker) and the view (1971) KLT (SN) 32 expressed by me there, which after all

1 AIR 1972 Ker 71.

2 Ibid, 75.

the arguments on both sides, I am not inclined to change, is that when a minor is entitled to avoid a transfer effected by his guardian on the ground of absence of permission of the court, it becomes a nullity on his unilateral act. He can merely avoid it by his conduct and there is no need to file a suit for avoiding the transfer".

In the case of improper alienations of de facto guardians, as seen earlier, the courts are unjustly divided; some hold an improper alienation is void, some hold it is voidable in a restricted sense. But in either case the minor need not bring a suit to set it aside. In Velayudhan v. Sreedharan¹ Varadaraja Iyengar, J., had said:

"Now Article 44 applies to suits to set aside a transfer of property by a guardian and instituted by a ward who has attained majority. The period fixed is three years from when the ward attained majority. The question is does this expression 'guardian' comprise 'de facto' guardian In my mind it does not. No doubt such de facto guardians are recognised by Hindu law as capable of transferring the minor's property for valid necessity and transfers by such guardians without necessity are not void but only voidable. But this only means that these defective transfers are capable of ratification by the minor on attaining majority and not that they are binding on the minor until set aside".

The errors in all this have been pointed out above. We have said earlier how the courts have created the artificial difference between the validity of an improper alienation of a natural guardian and that of an improper alienation of a de facto guardian. What the law has become as a result of

1 (1959) KLT 468.

this artificiality may be summarised as follows:

- (1) where an alienation is for the benefit of the minor, the minor will be as bound by an alienation of a de facto guardian as that of a natural or legal guardian;
- (2) an improper alienation of a legal guardian is voidable in the sense that the minor will be bound by it unless he sets it aside by a suit, while such an alienation of a de facto guardian is voidable in a restricted sense implying that the minor will not be bound by it; he may treat it as void by his act or conduct; and
- (3) in the case of an improper alienation by a legal guardian Article 44 applies for setting it aside, while in the case of such an alienation by a de facto guardian the setting aside of the transaction is not a condition to the recovery of the property from the alienee and the minor can sue for possession of the property within the period of twelve years limited by Article 142 or 144!

If all alienations of both de jure and de facto guardians are made voidable with equal incidents thereto there will be more uniformity of law and more certainty of rights. Where the property is in the possession of the minor no suit is necessary¹, he may plead his title in defence

¹ Narsingh Bahadur v. Suraj Din (1919) 52 IC 137; Raza Ahmad v. Zahoor Ahmed AIR 1930 All 858, 859.

against the trespasser. Where, however, the transfer is null and void there is no necessity for the party to come to the court promptly¹; he may sue for recovery of possession within the period of twelve years allowed by Article 142 or 144. An alienation by a de facto guardian under Muslim law, whether for necessity or otherwise, is void ab initio; but even this void alienation may be regarded as voidable. We have said earlier that the difference between 'void' and 'voidable' is very slender. Void against a particular person or group of persons means that it is voidable at the instance of that particular person or group of persons. Derrett has ably argued that a void transfer of a minor's property is 'indeed a voidable transfer'². So far as the voidable alienation is concerned the minor as well as the transferee know their limitations, the minor knows that unless he sets aside the alienation within the specified period he will lose his property and the transferee knows that unless he can prove the necessity or benefit for the sale and his bona fide enquiry into such necessity he will lose his title in the property. In the case of a void alienation there is the possibility of injustice on both sides. There is the apparent advantage that the minor need not come before the court. He can dispose of the property to a second transferee, and thereby disapprove of the first alienation. But he will not get a good purchaser willing to offer him a just price

1 Mohammad Nazir v. Zulaikha AIR 1928 All 267.

2 Critique, 189-190, paras 241-242.

for the property. Few people will come forward to purchase a property in impending litigation; those who will come will calculate and discount all the costs and expenses of the expected litigation and, in addition to that, they will pay hardly more than 50% of the market value, since they will consider it an investment in speculation. On the other hand, the transferee is always under the apprehension that he may lose the property even in the eleventh year and he may have to pay mesne profits. Again, if the minor has to come before the court himself there is hardly any difference between a voidable and a void alienation. There is loss in consideration of time in the one, but there is more loss in consideration of finance in the other.

10. Problem and solution

In all transactions with a minor's property, whether by a de jure or de facto guardian, the fundamental consideration is the protection of the minor's interest for which law has evolved the principle of benefit as the standard of judging the necessity for a transaction. As long as a transaction is in accordance with this standard all is well; but when it is not the question of suit arises and with it that of limitation. We have seen above how improper alienations are to be treated as void or voidable, and when title in improperly alienated property is to be cured. In its cure does the law of limitation do justice to either party? So far as voidable alienation is concerned the law is more or

less sound. But in the case of a so-called void alienation it strangely may put either party to a disadvantage. This can be done by treating all void alienations voidable, for which, as we have seen, judicial authority exists and contrary authority is unsound. In sastric law¹ a minor's property was not allowed to be lost by adverse possession. Under the present law relating to void alienation little protection is afforded to alienees. Derrett says²:

"The man whom the law penalises is the alienee and it is only against the law that the alienee can have any claim --- an obviously useless one. Thus in order to protect alienees all improper alienations by guardians should be voidable ..., for if alienees are in healthier position minors' properties have a larger value in the market".

Only under 'voidable' alienations it is possible that as long as a guardian acts bona fide and the alienee likewise the time should run out three years after majority, a very convenient period of time within which title will be settled, and in the case of de facto guardians the need to file a suit will also be introduced, which will protect the alienee much better. Moreover, under voidable alienation there is little apprehension of a minor's being tipped down wells³, an unhappy eventuality which is evidenced in the cases and which is not avoided by section 8(3) of the HMGA where the minor can make no alienation during his minority and the murderer, or his wife, may be the minor's intestate heir!

1 Manu VIII. 148; Nar. I. 80; Vas. XVI. 18.

2 Critique, 190 para 242.

3 Palani Goundan v. Vanjiakkal AIR 1956 Mad 476.

C H A P T E R VI

LAW OF GUARDIANSHIP IN SRI LANKA

1. Different influences on the law of Sri Lanka

If the legal systems of India, Pakistan and Bangladesh present a mixture of double influences, viz., the customary laws of the peoples inhabiting those countries, and the English Common law and equitable principles as applicable to their 'society and circumstances', the legal system of Sri Lanka presents a mixture of treble influences, viz., the customary laws of the local people, the Roman-Dutch law¹ and the

1 For Roman-Dutch influence see the Proclamation of 23 September, 1799, in the Legislative Enactments of Ceylon Vol. 1, 189; A. W. Renton and G. G. Phillimore, Colonial laws and Courts (London: 1907), 186-88; J.C.W. Pereira, The laws of Ceylon (Colombo: 2nd ed., 1913), 18ff; Sir A.W. Renton, 'The Roman-Dutch law in Ceylon under the British regime', in (1932) 49 South African Law Journal, 161 ff; R.W. Lee, An Introduction to Roman-Dutch law (Oxford: 5th ed., 1953), 10, 23; the same, 'The Roman law and Common law elements in South Africa and Ceylon', in (1959) Acta Judicia, 114ff; J.D.M. Derrett, Religion, 284; T. Nadaraja, The legal system of Ceylon in its Historical setting (Leiden: 1972), 57-59; the same, 'The administration of justice in Ceylon under the Dutch government', in (1968) 12 Journal of the Ceylon Branch of the Royal Asiatic Society (NS), 1 ff; H.W. Tambiah, Principles of Ceylon law (Colombo: 1972), 15; J.W. Wessels, History of the Roman-Dutch law (Cape Colony: 1908), 386ff; L.J.M. Cooray, An Introduction to the legal system of Ceylon (Colombo: 1972), 43ff; the same, 'The administration of justice in Sri Lanka', (1976) 6 Hong Kong Law Journal, 67ff; see also Puthatampy v. Mailvakanam (1897) 3 NLR 42; Mudianese v. Appuhamy (1913) 16 NLR 117; Kuddiar v. Sinnar (1914) 17 NLR 243, 244; Nagaratnam v. Muttutambay (1915) 18 NLR 257, 259; Iya Mattayer v. Kanapathipillai (1928) 29 NLR 301, 307; Rabot v. de Siva (1909) AC 376; Silva v. Balasuriya (1911) 14 NLR 452; Samed v. Segutambay (1924) 25 NLR 481.

principles of English law¹. Sometimes the influences of the Indian Hindu², Muslim³ and Buddhist⁴ law, and that of a

- 1 For the influence of English law see Cooray, 'Common law in Ceylon', in (1972) 10/2 Ceylon Law Society Journal, 45ff; D.R. Wijegoonewardene, The law of Defamation (Colombo: 1956); Savitri Goonesekere, 'Res ipsa loquitur', in (1969) 1 Colombo Law Review, 76ff; Cooray, 'Secret trusts in Ceylon', in (1969) 1 Colombo Law Review, 46, 51ff; R.W. Lee, 'The Roman-Dutch law in South Africa: the influence of English law', in (1969) 1 Colombo Law Review, 1-11; Nadaraja, Legal system, 229-249; Tambiah, Principles, 132ff; the same, 'The law of Thesawalamai', in (1958) 7/4 Tamil Culture, 13-14; see also Seelachchy v. Visuvanathan Chetty (1922) 23 NLR 97, 116-118 (FB). The English law of undue influence was applied in Soysa v. Soysa (1916) 19 NLR 314, and Perera v. Tissera (1933) 35 NLR 257; the principle of Rylands v. Fletcher (1868) 3 HL 330 was applied in Korossa Rubber Co. v. Silva (1917) 20 NLR 65, 81; and the rule in Hadley v. Baxendale (1854) 9 Ex 341 was followed in David & Co. v. Seneviratne (1946) 47 NLR 73, 75-76. Besides this, English case law was widely applied in the law of defamation, malicious prosecution, contributory negligence, employees' liability and the liability of joint tort-feasors.
- 2 For Hindu law influence on Kandyan law see Derrett, 'The origins of the laws of the Kandyan', in (1956) 14/3 & 4 University of Ceylon Review, 105ff; F.A. Hayley, The laws and customs of the Sinhalese or Kandyan law (Colombo: 1923), M.L.S. Jayasekera, The sources and development of the customary laws of the Sinhalese upto 1835 (unpublished thesis, Ph.D, University of London, 1969); the same, 'The sources of Sinhalese customary law', in (1970) 1/1 Journal of Ceylon law, 81ff; Tambiah, Sinhala Laws and Customs (Colombo: 1968), 47ff. For Hindu law influence on Thesawalamai law see Tambiah, Principles, 112-115; the same, 'The law of Thesawalamai', in (1958) 7/4 Tamil Culture, 7-8; Sir I. Jennings and Tambiah, The Dominion of Ceylon: the Development of its Laws and Constitution (London: 1952), 262-263; T.S. Ramanathan, Tesawalamai (Colombo: 4th ed., 1972); also see Murugasu v. Aruliah (1913) 17 NLR 91, 92; Kumarasamy Kurrukal v. Karthigesu Kurrukal (1923) 26 NLR 33, 38.
- 3 For Muslim law influence see Tambiah, Principles, 115-116, 169; Nadaraja, Legal system, 14-15; J.N.D. Anderson, 'The Anglo-Muhammadan law', in South Asia Seminar, 1966-67, South Asia Regional Studies, University of Pennsylvania, 137, 141ff. In Sultan v. Peiris (1933) 35 NLR 57, 68, Macdonell, C.J., admitted that the Muslim law text-books of Ameer Ali and Tyabji were regarded as authoritative books by their courts.
- 4 For Buddhist law influence see Hayley, Laws and Customs, 530ff; T.B. Dissanayake and A.B. Colin de Soysa, Kandyan law and Buddhist ecclesiastical law (Colombo: 1963), 13-15, 241ff; Tambiah, Principles, 111-112; the same, 'Buddhist ecclesiastical law', in (1962) 8/1 Journal of the Ceylon Branch of the Royal Asiatic Society (NS), 71ff.

codified derivative English law, such as the Indian Penal Code and Criminal Procedure Code, cannot be ignored; derivative in the sense that they contained English principles which are processed and codified in the light of the practices and behaviour of the people of a country other than Sri Lanka where the codifications were adopted verbatim¹.

Before the British occupation, Sri Lanka was a Dutch colony where the Dutch themselves were governed by the 'Laws in force in the Fatherland' which means the Roman-Dutch law², and 'the natives (i.e., the Asian inhabitants) are governed according to the customs of the country if these are clear and reasonable, otherwise according to our laws'³. After their conquest the British continued the Roman-Dutch law by charter as the rule in civil and criminal matters and decided the cases of the 'natives' according to their customs. Sir Richard Ottley, Chief Justice of Sri Lanka, 1828-1833, observed in his answers⁴:

"These laws (laws administered by the British) therefore consist partly of the old Roman-Dutch law, partly of the customs of the natives, partly of the local statutes or regulations enacted in the time of the Dutch and also of the British. The criminal law is founded on the criminal law of the Netherlands as it existed antecedently to the conquest of the Island by the British, but various modifications have been introduced".

1 Tambiah, Principles, 106.

2 Nadaraja, Legal system, 11.

3 From the memoir of A. Pavilioen, Commander of Jaffnapatnam, written in 1665, as quoted by Nadaraja, Legal system, 10 f.n. 153, and also by Derrett, Religion, 284.

4 From the answers given in 1830 to His Majesty's Commissioners of Inquiry by the learned Chief Justice, as quoted by Moncreiff, A.C.J., in his dissenting judgment in Karonchi-hamy v. Angohamy (1904) 8 NLR 1, 9ff.

And further in his answers he stated:

"The laws applicable to property are very multiplied in Ceylon. The British have one Code, the Dutch another, the Mohammedans a third, the Malabars or Tamil inhabitants a fourth. The Sinhalese generally abide by the Dutch law. The Dutch laws of property are always applied where no other code is prescribed".

Almost similar to the Hindus and Muslims in British India who were the two major communities having their own distinct customary laws by which they were allowed to be governed, the three major communities in Sri Lanka, viz., the Kandyans, the Tamils and the Muslims were allowed by the Dutch and subsequently their liberal successors, the British, to be governed by their respective 'clear and reasonable' customs. In the absence of any such customs the Roman-Dutch law was applied to them also. Indeed the Dutch influence was little felt in the law of persons of these communities and this helped in the development of the three customary laws in Sri Lanka, namely, the Kandyan law applicable to the Kandyans, Tesawalamai to the Tamils specially of the Northern province of Sri Lanka, and Muslim law to the Muslims. Persons besides them, such as the low-country Sinhalese, the Tamils of the Eastern province, the Burghers and the Europeans, were governed by the Roman-Dutch law¹. In Sultan v. Peiris² the Roman-Dutch law was described as "the general law or the 'common law' of the Island", and

1 Tambiah, Principles, 229.

2 (1933) 35 NLR 59, 68.

in De Costa v. Bank of Ceylon¹ as 'residuary common law'. Roman-Dutch law as used, after the end of the Dutch regime in 1796, to imply the common law of Sri Lanka, does not mean the 'Roman-Dutch law pure and simple'² or the 'Roman-Dutch law as applied in the United Provinces of the Netherlands',³ or the Roman-Dutch law as applied in Sri Lanka under the government of the United Provinces of the Netherlands⁴; it is the latter body of laws as 'modified in many directions, both expressly and by necessary implication, by our statute law and also by judicial decisions',⁵. It is misleading to speak of the Roman-Dutch law as the common law of modern Sri Lanka. Nadaraja observes⁶:

"Today ... the Roman-Dutch law can at best be regarded as merely a 'subsidiary common law where our own law and practice are silent'. In fact, the residuary general law of modern Ceylon is a new body of law, neither pure Civil law nor pure Common law, which our legislators and judges have forged on the anvil of contemporary life in Ceylon out of materials derived mainly from the Roman-Dutch and the English law; and this mixed body of law may not inappropriately be termed 'an indigenous common law of Ceylon', because it has largely been fashioned in this country with particular reference to the conditions here".

However, because of its diverse laws the law of guardianship of Sri Lanka demands a quadrangular treatment, i.e., as it is under the three customary laws and lastly as under the Roman-Dutch law.

1 (1969) 72 NLR 457, 519.

2 Korossa Rubber Co. v. Silva (1917) 20 NLR 65, 74.

3 Kodeeswaran v. Attorney General of Ceylon (1969) 72 NLR 337, 342 (PC).

4 Ibid, 342.

5 Korossa Rubber Co.'s case (1917) 20 NLR 65, 74-75.

6 Legal System, 247.

2. Customary laws of guardianship

2.1. Kandyan law¹

Like many other systems under Kandyan law so long as the parents are alive the natural right of guardianship over the person and property of their minor children rests with them², and on their death it goes to the king³ as under sastric Hindu law⁴. Among the parents the father, if his marriage was in diga form⁵, is by nature and nurture the guardian of his minor children. If his marriage was in binna form⁶, he can exercise no right of guardianship over his children. Tambiah says⁷:

"In a binna-marriage, during the lifetime of the mother the father is not the guardian of the minor children. The children would live under the protection and guardianship of the maternal grandparents if they happen to live in the mulgedera [ancestral home], but if the maternal grandparents are dead the children will be under the guardianship of their mother. But if the mother dies, the father of the children becomes the guardian in preference to a maternal uncle. If the father leaves the wife's ancestral house with the children, the latter do not lose their rights to the maternal inheritance".

1 Nirmala Chandrahasan's article 'The vexed problem of definition in the application of the Kandyan law', in (1972) 3 Colombo Law Review, 56ff contains a nice account regarding the application of Kandyan law with recent cases.

2 A.B. Colin de Soysa, Digest of Kandyan law (Ceylon: 1945), 11.

3 Tambiah, Sinhala laws, 152; Derrett, 'The origin of the laws of the Kandyans', in (1956) 14/3 & 4 UCR, 124.

4 Kane, Dharmasastra Vol. 3, 574.

5 In diga-marriage the wife is conducted to her husband's house and she lives in that house with her husband's family. See Tambiah, Sinhala laws, 129; Niti Nighanduwa, 17.

6 In a binna-marriage the husband is brought to the house of the wife or her relations and resides on the property belonging to the wife's ancestral home, and he is liable to expulsion at any time by his wife or her parents. See Tambiah, Sinhala laws, 127-28.

7 Sinhala laws, 153.

On the death of the father the diga-married mother becomes the natural guardian of the person and property of her minor children in preference to the male agnatic relations of the minors¹. Her right of guardianship may be forfeited if by her conduct she brings 'shame and disgrace' to the relations. In Kandyan society 'nothing is considered a great calamity to the family than where a woman contracts a marriage with a man of lower caste'². If she contracts such a marriage or commits a theft or some such other crime the paternal relations may take the children from her care on the ground that they will contract the same evil habits³.

Kandyan customary law gives the parents the right to nominate guardians for their children; and the parents may exercise it orally⁴ or by will. Not only laymen but also priests may be appointed as guardians⁵. In the appointment of a guardian the diga-married husband has a preferential right over his wife. Conversely, a binna-married wife has a similar right over her husband. Where a diga-married mother appoints a guardian 'such guardian cannot inherit the property of the ward which the latter inherited through his or her father'⁶.

1 Ampitiya Menik Etena v. Appoo Naide (1819) Hayley, Laws and customs, Appex. 2 note 51.

2 Tambiah, Sinhala laws, 153; Niti. 44-45.

3 Ibid

4 Niti. 44; Tambiah, Sinhala laws, 153.

5 Ibid

6 Tambiah, Sinhala laws, 154.

Under Kandyan law the father as guardian of his minor children can deal with their property for their necessity. The mother as guardian of her minor children has the right to sell or mortgage her deceased husband's estate including his paraveni¹ property during the minority of her children for the payment of her husband's debts without the permission of the court². To effect such a sale it is not necessary for her to obtain letters of curatorship from the court³.

On the death of both parents the testamentary guardian appointed by the father or mother becomes the lawful guardian of the minor children. Where no such testamentary guardian is appointed the children should be given to the 'charge of the most affectionate and loving of its relations', and for their welfare even their nearest relatives may be refused their guardianship⁴. Quoting Sawers, Tambiah observes⁵ that the guardianship of a minor under Kandyan customary law belongs to the following persons in the order given below:

- (1) maternal grandfather or grandmother;
- (2) maternal uncles or aunts;
- (3) paternal grandfather or grandmother;
- (4) paternal uncles or aunts;
- (5) an adult brother or sister.

1 Ancestral or inherited property. See section 10 of the Kandyan law Ordinances 39 of 1938 and 25 of 1944.

2 Tambiah, Sinhala laws, 153.

3 Ibid.

4 Niti. 44.

5 Tambiah, Sinhala laws, 154.

It appears that the Kandyans prefer the maternal to the paternal relations. The above persons cannot as a matter of right claim guardianship which the court decides at its own discretion. Kandyan law presents some similarity with Kautilya's views on the guardianship of the property of a minor. Kautilya prefers to keep a minor's immovable property with his maternal relations or village elders¹ instead of with his heirs or agnatic kins. Perhaps the Kandyans are led to believe that it is advantageous for the minor to keep property with strangers, since that will help him in asserting his independent rights and preventing unwarranted accidents².

Under Kandyan customary law the guardians are not only the custodian of minors' property, they are allowed to enjoy the usufruct of their property as long as the minors have not attained majority³. But they cannot therefore alienate the minors' property even with the consent of the minors⁴. As a corollary of the guardian's right to enjoy the usufruct of his minor ward's property, a Kandyan guardian is personally liable for the maintenance of the minor. He cannot in the event of the minor having no property call upon other relations to contribute towards the minor's maintenance, unless he gives up his guardianship⁵. Where a

1 Kaut. III. 5; Kangle, Arthasastra Vol. 2, 210; Kane, Dharmasastra Vol. 3, 573.

2 Derrett, 'The origins of the laws of the Kandyans', in (1956) 14/3 & 4 UCR, 105, 123-24.

3 Hayley, Laws and customs, 216; Tambiah, Sinhala laws, 156 f.n. 1.

4 Niti. 47; Tambiah, Sinhala laws, 156.

5 Hayley, Laws and customs, Appex. 1 (Sawer's Memoranda and Notes), 23.

guardian spends money on his ward he cannot ask for a refund of it even after the minor has attained majority. Probably this may indicate the reason why a guardian has a preferential right over other relations in the matter of succession if the minor dies without descendants or close relations¹. It is the guardian's duty to free the minor's ancestral property from encumbrances, if any, by paying the debts out of the profits of the estate. If necessary, he could even use the capital or sell the corpus of the estate for such payment.

2.2. Tesawalamai

Unlike Kandyan law Tesawalamai was a codified law since the Dutch period²; and the British continued to apply it to the Tamils. The father is the natural guardian of his minor children under the Tesawalamai. But peculiarly enough he loses this right over his 'young' children when he contracts a second marriage after the death of his first wife³. Section 11 of the Tesawalamai⁴ provides:

"If the father wishes to marry a second time, the mother-in-law or nearest relation generally takes a child or children (if they be still young) in order to bring them up, and in such case the father is obliged to give at the same time with his child or children the whole of the property brought in marriage by his deceased wife, and the half of the property acquired during his first marriage".

1 Derrett, 'The origins of the laws of the Kandyans', in (1956) 14/3 & 4 UCR, 105, 124; Hayley, Laws and customs, 482-85.

2 Jennings and Tambiah, Dominion of Ceylon, 262-63; Tambiah, Principles, 200.

3 Tambiah, The laws and customs of the Tamils of Jaffna (Ceylon: 1947), 148-152.

4 Regulation 10 of 1806 and Ordinance 5 of 1869.

On the death of the father guardianship of his minor children devolves on their mother. The mother retains the whole of the property if she takes the children by her deceased husband and keeps them until they marry when she is obliged to give them a dowry¹. The sons cannot demand anything so long as the mother lives. But, as in the case of the father, if the mother marries a second time she, too, loses her right and has to surrender the guardianship to her parents. When both the parents are dead the maternal grandparents become the guardians of the minors in preference to paternal grandparents. In this respect Tesawalamai presents a similarity with the Kandyan law and also sastric Hindu law so far as Kautilya's views are concerned. Though the maternal grandmother is given the custody of the person of minors and the whole of their deceased mother's property brought by her marriage plus half of the property acquired during her first marriage when the father remarries, she cannot claim it as a matter of right². It is the discretion of the court to allow her to keep the child as against the father if he proves to be unfit to be entrusted with the child. Where the father is deprived of guardianship on the ground of unfitness he has to provide for the maintenance of the child while it remains under the custody of the grandmother or other relation³.

1 Section 9, Tesawalamai.

2 Annapillai v. Saravanamuttu (1938) 40 NLR 1.

3 Thevanapillai v. Ponniah (1914) 17 NLR 437.

2.3. Muslim law

Like Tesawalamai Muslim law in Sri Lanka was codified by the Dutch¹ and the British adopted that code to decide Muslim law cases. But the code was not an exhaustive one. In R. v. Miskin Umma² Bertram, C.J., called it a 'rough modification of certain portions of jurisprudence' to be read in the light of the general principles of Islamic jurisprudence. In spite of its incompleteness if there occurs any conflict between the provisions of the code and the principles of Muslim law, it is the former which the courts should follow³. In matters of guardianship the code contains little information, and the courts follow the general principles of Muslim law⁴ preferably of the Shafi school⁵.

3. Roman and Roman-Dutch law of guardianship

As seen in chapter 1, in Roman law as long as the pater-familias was alive the question of guardianship of minors

1 Tambiah, Principles, 227.

2 (1925) 26 NLR 330, 333.

3 Bandirala v. Mairuma Natchia (1912) 16 NLR 235. The code was repealed by the Muslim Intestate Succession and Wakfs Ordinance (Ordinance 10) of 1931, the Muslim Marriage and Divorce Act (Act 13) of 1951 and the Muslim Mosques and Charitable Trusts or Wakfs Act (Act 51) of 1956.

4 Narayanan v. Saree Umma (1920) 21 NLR 439 per De Sampayo, J. See also Cooray, Introduction, 127ff.

5 On pure question of law as distinguished from questions of usage or practice where the code is silent the courts refer to the Anglo-Indian standard text-books on Muslim law, such as those of Tyabji, Ameer Ali and Fyzee. See Lebbe v. Thameen (1912) 16 NLR 71, 73; Sithi Mafthooha v. Thassin (1963) 65 CLR 84, 85. Paradoxically, all these text-books contain Hanafi law as it grew up in India.

under his potestas did not arise. It was only when he died that their guardianship was taken up by persons appointed by his will. If there were none so appointed it would be taken up by near relations, and in their failure by guardians appointed by the court known as tutors.

The functions of these tutors or guardians lasted until the minors attained puberty, and from that age until the age of twenty-five curators were appointed for them by the 'appropriate authority'. Dutch law, however, made no such distinction between the two stages in minority. Under it all children below the age of twenty-five years were minors, and tutorship and curatorship were merged together into a single office of guardianship. Again, contrary to Roman law, Dutch law did not recognise a surviving parent as the natural guardian of the children¹. Lee observes²,

"In the Dutch law the father generally administered the property of the minor children during the subsistence of the marriage. But a surviving parent was not as such their guardian, however much parental power might imply control of the person. After his wife's death the father had a prior claim to be appointed guardian to act concurrently with the testamentary guardian or guardians nominated by his wife or with one or more guardians appointed by the Court or the Orphan Chamber, when it was charged with this function. Except in this capacity a surviving father had no right to intermeddle with the estate".

In recent years this view has undergone changes in favour of the father; and he is now regarded as the natural

1 Manickam Chettiar v. Murugappa Chettiar (1957) 60 NLR 385, 388.

2 Roman-Dutch law, 36.

guardian of his legitimate children until they attain majority. He has not only the paramount right to the custody of his children; he has now the exclusive control of their property except where a curator has been nominated by the donor of property to the minor, or the court deems him unfit. His powers are greater than those of a testamentary or court-appointed guardian; he can receive and retain moneys due to the minor, can invest them in 'good securities', and can utilise the profits and income of the property for the minor's maintenance, education and similar other purposes¹. But this does not give him an unlimited power. He cannot bind the minor by a contract for the purchase of land for which there is no fund, nor can he impose a liability on the minor for the payment of a purchase price detrimental to the minor's interest.

A mother's right of control over the person and property of her legitimate children does not arise until the father is dead. Where the father has appointed a guardian, the testamentary guardian obtains the guardianship over the person and property of the minor children. This does not, however, imply that the mother is ousted from the personal control of her minor children; she is allowed some sort of joint guardianship as under English law. When a father dies without appointing any tutor or guardian, the mother acquires the full rights of a natural guardian and gets all the powers

¹ Donaldson, Minors in Roman-Dutch law, 6.

which her husband enjoyed before his death, including the right to appoint tutors by will for the minor children¹.

As under Roman law so also under Dutch law a guardian in general must provide for the maintenance and education of his ward according to the ward's situation in life and the value of his property. In the management and administration of the minor's property he must 'display the diligence of a bonus paterfamilias'². He may sell or mortgage the minor's movable and immovable property, but in the case of the latter he must obtain the sanction of the court. He must preserve and secure the property, but unless he is the father of the minor, he should not keep any excess money of the minor in his hands. He may invest the surplus in government securities and pay the debts and liabilities of the minor as they fall due. He has no right to make a donation of a minor's property or to release a manifest right of the minor. He may enter into a contract on behalf of the minor, but this does not give him a right to bind the minor with an onerous contract. He is to authorise the minor's acts, i.e., interpose his authority in the minor's transactions. During the continuance or on the termination of guardianship or as and when the court directs, he must submit accounts of the minor's properties³.

1 Lee, Roman-Dutch law, 37.

2 Ibid, 106.

3 Ibid, 109.

4. Roman-Dutch law in Sri Lanka

Roman-Dutch law which was applied in Sri Lanka during the Dutch occupation was a modified form of Dutch law. It was mainly the customary laws of the Province of Holland as were consistent with customs of the people of Sri Lanka. In it Roman law was only one of the component elements. The whole of the Roman law as it existed in Holland was never bodily imported into Sri Lanka and it never formed part of the law of Sri Lanka¹. Nadaraja says²:

"A judge would have enquired first whether any local statutes dealt with the matter in hand. Where local statutes contained no clear provision on the point or were silent, and in the absence of any local custom having the force of law, he would have had recourse to the statutes of Batavia. If these two were silent, he would then have turned to the law of Holland, excluding such customs and legislation as had reference to the special local circumstances of the mother-country. In practice this meant that he would have relied on the general principles expounded in those 'books of authority' which were most commonly used".

It consisted of the Old and some New Statutes of Batavia³, which were consistent with the customs of the Dutch settlers and their government in Sri Lanka⁴. From the memoir of A. Pavilioen⁵ it is understood that this law was applied to the Dutch settlers in Sri Lanka and to those who had no 'clear and reasonable customs of their own'.

1 Silva v. Balasuriya (1911) 14 NLR 452, 458.

2 'The administration of justice in Ceylon under the Dutch Government', in (1968) 12 Journal of the Ceylon Branch of the Royal Asiatic Society (NS), 1, 13-14.

3 Cooray, Introduction, 5, 43ff; Tambiah, Principles, 119-21.

4 Jennings and Tambiah, Dominion of Ceylon, 181.

5 Derrett, Religion, 284; Nadaraja, Legal system, 10 f.n. 153.

The British after assuming the sovereignty over Sri Lanka continued to administer it. It still exists today as a 'subsidiary common law' of Sri Lanka.

5. Modern law of guardianship in Sri Lanka

The law of guardianship of minors in Sri Lanka is the 'Roman-Dutch law subject to the modifications made by the Civil Procedure Code, 1889, in particular, and other enactments',¹. Thus appropriate cases of guardianship will be decided by the Code in supersession of all other laws in Sri Lanka, and wherever there is no express provision in it, the Roman-Dutch law will apply².

5.1. Statutory law

Chapter 40 of the Civil Procedure Code, 1889, contains provisions for the appointment and functions of a guardian for the person and a curator for the property of a minor. Whoever claims the right to have charge of a minor's property in trust under a will or deed or by reason of nearness of kin, he may apply to the District Court for a certificate of curatorship³, and the court on its satisfaction will grant the certificate to him. Where there is no such person or if such a person is unwilling to undertake the trust,

1 Cooray, Introduction, 25.

2 Tambiah, Tamils of Jaffna, 43; the same, Sinhala laws, 156.

3 Civil Procedure Code, 1889, section 582.

and the court finds a near relative of the minor willing to accept the curatorship, and the court considers him, on the recommendation of a headman whom the court calls upon to report on the character and qualification of such relative, fit to be entrusted with the charge of the minor's property, such relative may be granted a certificate. The same person to whom a certificate of curatorship is granted may also be appointed as the guardian of the minor by the court, if it deems him fit¹. Where the court does not issue a certificate to a person claiming under a will or deed and where there is no near relative willing and fit to be entrusted with the charge of the minor's property, if the court thinks an appointment necessary for the interest of the minor it may appoint any person whom it deems fit for the purpose and grant him a certificate². In this case when the court is granting a certificate of curatorship, it must at the same time appoint a guardian 'to take charge of the person and maintenance of the minor'; but the person to whom the certificate of curatorship has been granted should not be appointed a guardian if he would be a 'legal heir of the minor if the minor then died'³. The guardian must provide for the education of the minor in a 'suitable manner'⁴. The curator should file in the court an account of the property belonging to the minor on assuming the

1 CPC, section 585; see also K.D.P. Wickremesinghe, Civil Procedure in Ceylon (Colombo: 1971), 347.

2 CPC, section 586.

3 Ibid, section 587.

4 Ibid, section 594.

office, and, when it is in his charge, accounts showing the receipts and expenditure of the property¹. If he fails to give satisfactory accounts, he may be removed by the court². The appointment of the curator as well as the guardian is however a matter of discretion of the District Court within whose jurisdiction the minor resides³. But if the minor does not reside within the jurisdiction of the District Court, it has no power to appoint a curator over his estate, even though the minor may have property situated within its jurisdiction⁴.

In their setting and language the provisions contained in chapter 40 of the Civil Procedure Code of 1889 are similar to those of the Bengal Minors Act 40 of 1858 and the Bombay Minors Act 20 of 1864. In a way the provisions of the Civil Procedure Code of Sri Lanka have stated the law more strongly against the union of the guardianship of person and property of a minor in the same individual when the person to be appointed is the legal guardian of the minor if he died then. Kautilya's views are more aptly followed in it, since when the willing near relative is considered to be appointed a curator of the minor, the court seeks the opinion of a headman about the character and qualification of the said relative. Although the customary laws are made to go into disuse by the statutory and Dutch law, they may still play

1 CPC, section 588(2).

2 Ibid, section 591.

3 Courts Ordinance No. 1 of 1889, section 71, and section 69(1) as amended by section 7 of Ordinance No. 4 of 1938.

4 Such is the law if sections 582 and 584 are read together. See also Muttiah v. Baur (1906) 9 NLR 190, 195; In re Daisy Fernando (1896) 2 NLR 249.

their role in the consideration of the choice when two or more applicants are there under section 582 of the Civil Procedure Code which provides that a certificate of curatorship may be issued to a person who claims 'a right to have charge of property in trust for a minor by reason of nearness of kin or otherwise'. The Code has made a departure from the Dutch law and aligned itself with the Indian statutory enactments¹. It has put much consideration on the minor's welfare by separating the guardianship of person from that of property wherever necessary. In Roman-Dutch law the term 'guardian' was used to imply one appointed to take charge of both the person and property of a minor, and the term 'curator' to one appointed to take charge of the estate of a lunatic or prodigal; but under the Code the term 'curator' is applied to one entrusted with the property of a minor², and 'guardian' to one with the person of the minor³, just as the terms 'manager' and 'guardian' were used under Indian Acts. The Code contains little law regarding the duties of a curator or guardian excepting those which are stated in sections 588 and 594.

5.2. Courts of Sri Lanka and the law of guardianship

5.2.1. Guardianship of person

As under all the customary laws of Sri Lanka (excepting in the case of children by binna-marriage in Kandyan law) so

1 Bengal Minors Act 40 of 1858, and Bombay Minors Act 20 of 1864.

2 CPC, section 582.

3 Ibid, section 587(1).

also under Roman-Dutch law the father is the natural guardian of his legitimate minor children¹; and his right to the custody of their person remains unaffected even by the fact of separation of the spouses. In Ivaldy v. Ivaldy² Fernando, J., referring to the judgment of a South African case³ laid down that under the Roman-Dutch law where there was no legal dissolution of a marriage the court could not deprive a father of his custody of his minor children except⁴ (1) that in authorising the parents to have a separate home the court could 'regulate the parental power in accordance with the interests of the minor child', and (2) that the court as upper guardian of all minors has powers to interfere with the father's custody on special grounds, such as 'danger to the child's life, health or morals'. The father's right to custody cannot be said to be absolute. The Supreme Court has jurisdiction in a writ of habeas corpus to take away the custody of a minor child from the legal custody of the father and hand over the same to the mother if such a course is necessary in the best interests of the child's life, health or morals⁵. In Padma Fernando v. T.S. Fernando⁶ while affirming his own views expressed in Ivaldy's case Fernando, J., stated that 'so long as the mother is shown to be fit

1 Madulawathie v. Wilpus (1967) 70 NLR 90, 91.

2 (1956) 57 NLR 568.

3 Calitz v. Calitz (1939) SALR 56, 63 (AD).

4 E. Spiro, The Law of Parent and Child (Juta, Cape Town, 1959), 170.

5 Kamalawathie v. De Silva (1961) 64 NLR 252; Gooneratnayake v. Clayton (1929) 31 NLR 132.

6 (1956) 58 NLR 262, 264.

to take care for the child', it is the natural right of the child that she should enjoy the advantage of her mother's care and not be deprived of that advantage capriciously, since such a forcible separation from the mother would be detrimental to the life, health and morals of the young child. When in Weragoda v. Weragoda¹ the respondent's counsel relying on Roman-Dutch law principle enunciated in Calitz's case urged that the rights of the father were superior to those of the mother in regard to the custody of minors, Sansoni, J. reviewing a wide range of English cases² quoted the Privy Council dictum of Lord Simonds in McKee v. McKee³ that "the welfare and happiness of the infant is paramount consideration ... to this paramount consideration all others yield", and observed that the danger to the child's life, health and morals was only an example of special grounds which would justify the interference of the court, and that it was for the court to decide who would have the custody of the child after "taking into account all the factors affecting the case and after giving due effect to all presumptions and counter-presumptions that may apply, but bearing in mind the paramount consideration that the child's welfare is the matter that the court is there to safeguard". In English law the courts fulfil this duty by considering

1 (1961) 59 CLW 49.

2 R v. Greenhill (1836) 4 Ad & El 624; 111 ER 922; In re Fynn (1848) 2 De G & Sm 457; 64 ER 205; In re Agar-Ellis (1883) 24 Ch D 317 (CA); R. v. Barnado, Jone's case (1891) 1 QB 194 (CA); R. v. Gynqall (1893) 2 QB 232 (CA).

3 (1951) AC 352.

the whole of the 'circumstances of the case, the position of the parent, the position of the child, the age of the child, the religion of the child so far as it can be said to have any religion, and the happiness of the child'.¹

The same concept of welfare of a child in determining the issue of his custody is implied by the phrase "danger to the child's life, health or morals" in Roman-Dutch law². There is no difference between the English and Roman-Dutch law in this respect³. Though in Weragoda's case Sansoni, J., said that the danger to life, health or morals was only an example to the special grounds which would justify the interference of the court, this does not appear to have made the principle of welfare subservient to the father's right when he said that "the rights of the father will prevail if they are not displaced by considerations relating to the welfare of the child, for the petitioner who seeks to displace those rights must make out his or her case". However, in Kamalawathie v. De Silva⁴ where the mother of a five year old child applied for the custody of the child against the father who was a reckless man who never gave money for running the house, Tambiah, J., followed Padma Fernando's case and held that as long as the mother was a fit person the father could be deprived of his right to custody. But

1 Re McGarth (1893) 1 Ch 143, 148.

2 This phrase was quoted in Ivaldy v. Ivaldy (1956) 57 NLR 568 from the judgment of Calitz v. Calitz (1939) SALR 56 (AD).

3 There is merely some conceptual difference between the English and Roman-Dutch law in respect of the court's guardianship. In the former the court is the guardian of all minors, while in the latter the state is regarded as the upper guardian of all minors.

4 (1961) 64 NLR 252.

his reasoning suggests, and indeed the judgment shows that it does so, that the mother can claim custody even without leading evidence to indicate that the father was not fit to have the custody of the child. It may be submitted with due respect to the learned judge that he failed to consider the context in which the dictum in Padma Fernando's case was made. The facts of that case show that the father of a four and a half years old girl wished to entrust the child to his sister who was over fifty years of age to 'compensate her, apparently, for her own childlessness' and this persuaded the learned judge to form the opinion that "it would be detrimental to the life and health and even of the morals of such a young child if that child is forcibly separated from her mother and compelled to live, not even in her father's custody, but under the care of an elderly relative to whom she is not bound by any natural ties". The whole judgment of the case leads one to believe that the learned judge overrode the fundamental right of the father; and his bad arguments prompt one¹ to think that his decision obscured the validity of Ivaldy's case and shook the basic premise of the modern Roman-Dutch law, i.e., the preferential right of the father as enunciated in Calitz's case. Padma Fernando's case did not deny the father's right, it merely subjected it to

1 Savitri Goonesekere deplors the whole judgment as it has eroded the concept of the father's preferential right and created in its place a preferential right in the mother; and more so, she thinks it has jettisoned the delicate balance between parental power and the welfare of a child forged by the Roman-Dutch law and has introduced a liberal thinking into the law at the cost of 'the social traditions of Ceylon'. See 'Custody of minor children', in (1970) 1/1 Journal of Ceylon Law, 147.

the minor's welfare. Yet the actual situation in which Kamalawathie's case arose justifies denying a reckless, indifferent, indigent father the custody of the child. The welfare of the child demanded the custody to be given to the mother. The Roman-Dutch law independently of English influences recognises that the court can deprive the father of the custody in the interest of his child¹.

Like other progressive systems² the modern law of Sri Lanka, says Weeramantry, J., in Fernando v. Fernando³ has 'grown away from rules directed towards penalising the guilty spouse and towards a recognition of predominance of the interest of the child'. In South Africa a putative marriage which is null and void ab initio for defective procedure or formalities or suppression of vitiating factors by either party produces none of the legal incidents of marriage in favour of the spouses. But the status of children of such marriage does not differ in any way from that of other legitimate children⁴; and subject to any order that a court may make, the putative father as a natural guardian is entitled to the custody of the children. Similar to the

1 In Gooneratnayake v. Clayton (1929) 31 NLR 132, 135 Drieberg, J., observed that the custody of a minor could not be given to the father if the child capable of exercising discretion wished against it. In Boteju v. Jayewardane (1968) 75 CLW 55 Weeramantry, J., held that the custody of a child of tender age should be awarded to the mother despite the preferential right of the father if there was no convincing evidence of unfitness on the part of the mother.

2 Specially the South African system to which the judges of Sri Lanka nowadays look for references.

3 (1968) 70 NLR 534, 537.

4 H.R. Hahlo, The South African Law of Husband and Wife (Juta, Cape Town: 3rd ed., 1969), 453.

laws of South Africa questions of guilt and innocence of parents are not the sole determining factors in questions of custody in Sri Lanka. In deciding to whom custody would be awarded the interests of the minors are given the main and paramount consideration. Indeed the courts of that country have, by their increasing reference to the South African legal text-books, and the cases, shifted in its observance of principles from a conservative pole to a liberal. As said already the South African courts do not hesitate to give the custody of a child to a guilty spouse, if the interests of the child can be better served by its being given to the custody of the guilty spouse than to the innocent; and only when they fail to find out what is best for the child do they consider the guilt or innocence of the spouses and tip the scale accordingly¹. They do not take into account the superior right of the father as natural guardian. If they think that it would be best to keep the child with the mother they award the custody to her, even in the absence of any 'misbehaviour or shortcoming on the part of the father'².

In Fernando's case following the South African authorities Weeramantry, J., gave the custody of two minor children

1 Hahlo, South African law, 454.

2 Ibid. The view appears to be somewhat contradictory to the decision in Calitz's case. It is too much generalisation of the exceptions of that case. However, the courts of the two countries are following this recent trend, and it is more humanistic.

to their mother who bigamously married the putative father suppressing her earlier marriage. The learned judge gave emphasis to the paramount interests of the children and observed¹;

"There is a rule commended alike by law and ordinary human experience, which to a large extent will determine the matter before me. This is the rule that the custody of every young children ought ordinarily to be given to the mother, a rule which ought not to be lightly departed from".

The father's right to the custody of his children in Sri Lanka terminates where he surrenders the custody of the child to a stranger; and he cannot claim it back if the surrender is a legally complete one¹. But the mere handing over of a child by the natural parents to another does not indicate renunciation of their parental rights to the child², since under the Roman-Dutch law a natural parent has a right to the custody of his or her child and that custody can only be terminated under the circumstances which are well recognised and clearly defined by that law³. In Abeyawardene v. Jayanarayake⁴ Nagalingam, A.C.J., observed:

"The mere delivery of a child by its natural parent to a third party does not invest the transaction with any legal consequences. If the parent had a right to hand over the custody of a child then that parent would also have the undoubted right to resume the custody himself as the authority of the parent must prevail in the latter instance as much as in the former".

1 Samarasinghe v. Simon (1941) 43 NLR 129, 140.

2 Joachim Fernando v. Dylanthie Fernando (1965) 70 CLW 91.

3 Lee, Roman-Dutch law, 113.

4 (1953) 55 NLR 54.

This view was fully supported by de Krester, J., in Endoris v. Kiripetta¹ where a father applied for a writ of habeas corpus in respect of the custody of his eight years old son against the son's paternal aunt who had brought up the son from the time when his mother died and he was about a month old.

When the father is dead and no guardian is nominated by him, the mother takes his place as natural guardian of the children². But where both the parents are dead, a guardian of the person and a curator of the property of a minor will be appointed by the District Court as provided under the provisions of sections 582-587 of the Civi Procedure Code of 1889³. The courts of Sri Lanka have not made any departure from the Roman-Dutch law principle that the mother is the guardian of her illegitimate children⁴. When in Ran Manika v. Paynter⁵ a boy of thirteen years old was taken away from the custody of the mother by the putative father with whom the mother lived as a mistress and never married, Drieberg, J., gave the custody of the boy to his mother who is also recognised under English law to be entitled to the custody of an illegitimate child⁶.

1 (1968) 73 NLR 20, 21.

2 Ramalingam Chettiar v. Mohamed Adjwad (1938) 41 NLR 49, 53; Arunasalam Chettiar v. Murugappa Chettiar (1954) 57 NLR 21, 23.

3 See supra, 550-551.

4 Lee, Roman-Dutch law, 37.

5 (1932) 34 NLR 127.

6 Bromley, Family law (4th ed., 1971), 271.

5.2.2. Guardianship of property

5.2.2.1. Alienation by guardians under Roman-Dutch law

As said earlier under Roman-Dutch law a guardian was both the custodian of the person and property of a minor; and he could deal with the minor's movable property, but not with immovable property unless he was permitted by the court to deal with it. If an alienation of immovable property was effected by him without the permission of the court it became ipso jure null and void; so also if the permission was obtained by fraud. The remedies of a minor in respect of an unauthorised alienation of his property were two¹, viz., (1) he had actio tutelae directa against the tutor, and (2) he could vindicate the property against the alienee together with all fruits, where the defendant's possession was mala fide, but where it was bona fide together with fruits existing only at the time when the action was brought. If, however, the purchase money was received and applied to the minor's use or benefit, it should be refunded with interest as a condition precedent of the return of the property. On attaining full age a minor could ratify an alienation void ab initio. Such ratification could be either express or implied. In Roman-Dutch law even after ratification a transaction could be rescinded by the minor on the ground of laesio enormis, i.e., on the ground of the contract being onerous, or the price paid being inadequate.

1 Lee, Roman-Dutch law, 108-109.

5.2.2.2. Alienation by guardians under the law of Sri Lanka

In Sri Lanka the powers and responsibilities of a court as the traditional upper guardian of minors under Roman-Dutch law have received statutory recognition in section 69(1) of the Courts Ordinance of 1889 whereby every District Court is entrusted with the care and management of a minor's estate situated within its jurisdiction¹. The section provides:

"Every District court shall have the care and custody of the persons and estates of all idiots and persons of unsound mind and others of insane and non-insane mind resident within its district, with full power to appoint guardians and curators of all such persons and their estates, and to make order for the maintenance of such persons and the proper management of their estates, and to take proper securities for such management from such guardians and curators, and to call them to account, and to charge them with any balance which may be due to any such persons as aforesaid, or to their estates, and to enforce the payment thereof, and to take order for the secure investment of any such balances; and such guardians and curators from time to time to remove and replace as occasion may require.

Also in the like manner, and with the same powers, the care of the persons of minors and wards and the charge of their property within its district shall be subject to the jurisdiction of the District court".

As seen earlier chapter 40 of the Civil Procedure Code of 1889 provides for the appointment of curators to take charge of such property under the general supervision of the court. But no express provision is made for granting authority to a curator to sell or alienate a minor's property; it has always been assumed that such authority would be given

¹ Fernando v. Fernando (1968) 72 NLR 174.

subject to well established limitations in appropriate cases. In fact, the Civil Procedure Code recognises and does not limit the powers conferred on guardians by Roman-Dutch law¹. Gratiaen, J., in Cassaly v. Buhary² quoting from the judgment of Cayley, J., in Re Hider, ex parte Corbet³ observed:

"When an application is made by a curator for sanction to sell or encumber property belonging to a minor, 'there should be a decree ... the minor being represented by a guardian-ad-litem for the purpose. The facts should then be especially adjudicated upon, and a formal order entered. There must in fact be, as laid down in Voet 27:9:6, a causae cognitio, a probatio, and a decretum.' The Court, before sanctioning a sale of property which is already vested in the minor, must be satisfied on proper material that the proposed transaction is 'manifestly to his advantage'".

Under the Civil Procedure Code the curators⁴ are allowed to deal with the minors' immovable property, if they do it with the sanction of a court⁵ of competent jurisdiction⁶. Since in Sri Lanka a curator appointed under the Civil Procedure Code is different from a Roman-Dutch guardian, a natural, testamentary or court appointed guardian cannot alienate or encumber the property of a minor unless he has been appointed a curator by the court. On the death of the

1 Pereira, Laws of Ceylon, 193.

2 (1956) 58 NLR 78, 81.

3 (1876) 3 SCC 46. The relevant portion from the judgment of this case was also quoted in Mudiyanse v. Pemawathie (1962) 64 NLR 542, 545.

4 Under the Bengal Minors Act 40 of 1858 and the Bombay Minors Act 20 of 1864 a person in charge of the management of a minor's property was called a manager, and a person in charge of the minor's person, a guardian.

5 Mana Perera v. Perera Appuhamy (1895) 1 NLR 140.

6 Mustapha Lebbe v. Martinus (1903) 6 NLR 364; Girigorishamy v. Lebbe Marikar (1928) 30 NLR 209.

father, the mother also cannot deal with her minor children's property, if she does not obtain a certificate of curatorship from the court¹.

In issuing a certificate of curatorship the court cannot authorise the sale of a minor's future contingent interest in property. If there are unborn potential beneficiaries to whom the property or some interest in it could on a certain contingency pass in due course, a stricter test than usual must be satisfied. Where an unborn person is involved the authority to sell his future contingent interest cannot validly be granted by the court unless the benefit to the immediate and known beneficiaries is overwhelming as compared with any possible detriment to the unknown ultimate beneficiaries². Indeed only an alienation on the ground of extreme necessity would be justified.

When a curator applies to the court for permission to sell a minor's property, the court may grant him a certificate (1) when the sale is necessary for the payment of debts, (2) when it is for the maintenance of the minor, or (3) when it is clearly for the benefit of the minor³. Thus where A transferred certain immovable property to the children of Mr. and Mrs. B by a deed of gift and empowered Mrs. B to sell it, if necessary for the benefit of the children, and invest the proceeds in the purchase of another property, or

1 Lebbe v. Christie (1915) 18 NLR 353 (FB).

2 Cassaly v. Buhary (1956) 58 NLR 78, 81-82.

3 Mustapha Lebbe v. Martinus (1903) 6 NLR 364.

deposit the same in a bank in favour of the children. When Mrs. B sold the property and spent the money, the court held that the sale was void as it was done without the previous sanction of the court whose duty it was to see that fair price was paid and that the sale was manifestly for the advantage of the minor¹. So also where a guardian mortgaged the property of two minors for the purpose of raising money to meet the expenses of the minors as directed by the deed of gift under which the property was donated to the minors, the court held that the mortgage was void, for it was done without the previous sanction of the court². Again, unless made under the sanction of the court, a natural or a court appointed guardian cannot grant a lease of a minor's property³. If he does, it would be void⁴.

The natural guardian of a minor of tender years cannot even compel the minor's debtors to pay the money due to the minor, unless he is appointed as curator by the court⁵. In Manickam Chettier v. Murugappa Chettier⁶, Basnayake, C.J., observed that Voet used to say that a father or a mother was not ipso jure guardian unless he or she was so assigned by the 'last will of the deceased spouse or of some stranger', and that unless they were confirmed by a magistrate they

1 Mustapha Lebbe v. Martinus (1903) 6 NLR 364.

2 Girigorishamy v. Lebbe Marikar (1928) 30 NLR 209.

3 Lebbe v. Christie (1915) 18 NLR 353 (FB).

4 Perera v. Perera (1902) Brown 150.

5 Arunasalam Chettiar v. Murugappa Chettiar (1954) 57 NLR 21.

6 (1957) 60 NLR 385.

could not exercise legal guardianship over their children's property. It is yet to be seen how much a parent can take the cover of negotiorum gestio which is still in use in the courts of Sri Lanka. If the Supreme Court of Sri Lanka can find a negotiorum gestio situation in a case where a person pays off the debts of another, why can a parent or a guardian who deals with a minor's property demonstrably advantageous to the minor, and not in 'bad faith and with intention of furthering his own interests', not bind the minor? In Atukorale v. Atukorale¹ Samerwickrame, J., observes that if a person pays off a debt of a third party with the knowledge and consent or acquiescence of that party, he acts upon a mandate from him and is thereby entitled to recover the money paid as upon a contract; but if he does so without such knowledge or consent, the debtor acts by way of a negotiorum gestio; and if the third party brings an action as negotiorum gestor, he is normally required to show that he acted with the intent of serving the interests of the debtor. The learned judge further observes that the scope of the action may be extended on equitable grounds to a gestor who intervened in bad faith and with intention of furthering his own interests, and in such a case his claim against the debtor is limited to the extent to which the debtor has been enriched.

¹ (1971) 71 NLR 369, 374. The case may well be compared with the English case G (A) v. G (T) (1970) 3 All ER 546 (CA) where the parent of minor made some payments on behalf of the minor, and Lord Denning, M.R., held that a disposition by an agent for a minor was voidable and the minor would be bound by it unless avoided within a reasonable time after attaining majority.

If a curator alienates a minor's property without the permission of the court, the alienation becomes ipso jure void; and the minor may avoid such a transaction either by restitutio in integrum or by a vindictory action. In Cassaly v. Buhary¹ Gratiaen and Gunasekara, JJ., held that under a void transaction the minor was entitled on attaining majority to vindicate his title to the property.

The following principles are set out in Sande² and Voet³:

"If the immovable property of a pupil, minor, or madman, or that movable property which can be safely kept, is sold without good grounds for alienation, and without an order of court, the alienation is ipso jure void, nor does the dominium pass from the pupil or minor".
(Sande 1.1.79)

"A pupil or minor, whose landed property has been alienated in spite of a prohibition, retains an actio in rem, that is, a vindication, which he can maintain not only against the purchaser, but also against any third person who has possession".
(Sande 1.1.80)

"It seems unquestionable that restitution would not be necessary to a minor, but that the ordinary vindictory action could be brought against the purchaser as possessor, because no one's property can be transferred to another by someone else at his pleasure".
(Voet 4.4.16)

The above principles were approved by the South African court in Breytenbach v. Frankel⁴ where Solomon, J., after quoting them observed:

"And the distinction drawn by Voet and Sande between the two actions is a matter of substance, and not

1 (1956) 58 NLR 78, 81.

2 Johan Van Den Sande, Treatise upon Restraints upon Alienation of Things [Tr. by W.S. Webber (Juta, Cape Town, 1892)], 41-42.

3 Johannes Voet, The Selective Voet being the commentary on the Pandects [Tr. by Percival Gane (Durban: 1955) in 8 Vols], 666.

4 (1913) SALR 390, 400 (AD).

merely of form. For where the vindicatory action lies, the minor is entitled to succeed on mere proof that his property was alienated by his guardian without the sanction of the court; whereas ... if the action is one for restitutio in integrum, the onus lies on the minor to prove damage. We were referred to authorities to the effect that it is necessary for a minor to come to the court for restitution in cases where his guardian has entered into contracts on his behalf. But in my opinion, those authorities apply to contracts only, and have no reference to the case of an alienation of immovable property. Such an alienation is dealt with on entirely different lines, and, as I have pointed out, there is a great mass of authority to the effect that such an alienation is of no effect, and that there is no necessity, therefore, for the minor to apply for restitution".

The courts of Sri Lanka approved the decision in Bretenbach's case and followed the authorities of Sande and Voet in Cassaly v. Buhary¹ and Mudiyanse v. Pemawathie².

6. Law of prescription in Sri Lanka

Quite different from the law of limitation of India, Pakistan and Bangladesh, Sri Lanka has the law of prescription. In chapter 5 we have seen the conceptual difference and functional unity between the two terms 'limitation' and 'prescription'. The law of prescription of Sri Lanka is contained in Ordinance 22 of 1871 as amended by Ordinance 2 of 1889; and the Ordinance 22 of 1871 is based on English law³. Section 3 of the said Ordinance provides that lands or immovable property could be acquired by an uninterrupted adverse possession of ten years. The section runs as follows:

"Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under

1 (1956) 58 NLR 78, 81.

2 (1962) 64 NLR 542, 547.

3 Emanis v. Sadappu (1896) 2 NLR 261, 268-69 (FB).

whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgement of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs. And in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as herein before explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs:

Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute".

Section 4 provides that if a person is dispossessed of any immovable property he must bring an action for the recovery of that property within one year from the date of such dispossession. The section states:

"It shall be lawful for any person who shall have been dispossessed of any immovable property otherwise than by process of law, to institute proceedings against the person dispossessing him at any time within one year of such dispossession. And on proof of such dispossession within one year before action brought, the plaintiff in such action shall be entitled to a decree against the defendant for the restoration of such possession without proof of title:

Provided that nothing herein contained shall be held to affect the other requirements of the law as respects possessory cases".

But section 13 of the Ordinance provides that time would not run against a minor until he attains the age of majority. The section runs as follows:

"Provided nevertheless, that if at the time when the right of any person to sue for recovery of any immovable property shall have first accrued, such person shall have been under any of the disabilities hereinafter mentioned, that is to say ---

- (a) infancy,
- (b) idiocy,
- (c) unsoundness of mind,
- (d) lunacy, or
- (e) absence beyond the seas,

then and so long as such disability shall continue the possession of such immovable property by any other person shall not be taken as giving such person any right or title to the said immovable property, as against the person subject to such disability or those claiming under him, but the period of ten years required by section 3 of this Ordinance shall commence to be reckoned from the death of such last-named person, or from the termination of such disability, whichever first shall happen; but no further time shall be allowed in respect of the disabilities of any other person;

Provided also that the adverse and undisturbed possession for thirty years of any immovable property by any person claiming the same, or by those under whom he claims, shall be taken as conclusive proof of title in manner provided by section 3 of this Ordinance, notwithstanding the disability of any adverse claimant".

It is to be noticed that under the limitation law of India, Pakistan and Bangladesh if the person entitled to institute a suit against the adverse possessor is, at the time from which the period of limitation is to be reckoned, affected by a disability, he may institute the suit within the same period after the disability has ceased¹; or if he

¹ Section 6(1) of Limitation Act 9 of 1908, and Limitation Act 36 of 1963.

is, at the time from which the period of limitation is to be reckoned, affected by two such disabilities, or if before his disability has ceased, he is affected by another disability, he may institute the suit within the same period after both the disabilities have ceased¹; or if the disability continues up to his death, his legal representative may institute the suit within the same period after the death as would otherwise have been allowed from the time so prescribed²; or if the legal representative himself is, at the date of the death of the person whom he represents, affected by any such disability or disabilities, he, or if he dies in disability, his legal representative, may, in the repetition of the same process as stated above, institute the suit within the same period as would have been allowed to him whom he represents or as would have been allowed to him in the case of the death of the person whom he represents³. In this way the right to sue may continue for an indefinite period of time, and no title is created by adverse possession, since that person or his legal representative may establish his title in defence long after the expiration of the statutory period of adverse possession. But the Prescription Ordinance of Sri Lanka has specifically provided that after an adverse and undisturbed possession for thirty years an absolute title would be

1 Section 6(2) of the Limitation Act 9 of 1908, and Limitation Act 36 of 1963.

2 Section 6(3).

3 Section 6(4).

created in favour of the adverse possessor.

In Sri Lanka a minor is deemed to have attained the age of majority when he completes twenty-one years of age¹; and time does not run against him until he attains majority². Therefore where his property is adversely possessed by others or where he is dispossessed of his property by others, time will start running against him only when he has completed twenty-one years. He must bring an action against the adverse possessor within ten years, or against the person who ousts him from possession within one year from the date on which he completes twenty-one years. It is to be observed that in the case of dispossession no proof of title is necessary. Therefore where a minor is dispossessed of a property, he can bring the action for possession even if he makes no title to the said property.

An improper alienation of a minor's property by his curator or property guardian is regarded as void, and not voidable as in India, Pakistan and Bangladesh. But unlike the void alienation of these three countries, the minor in Sri Lanka is required to avoid the void transaction, otherwise it may be treated as ratified. Under the Roman-Dutch law a void alienation may be tacitly confirmed by an implied ratification as it were, if the minor has not raised any protest within five years after attaining majority³. But

1 Age of Majority Ordinance (Ordinance 7) of 1865, sec. 2.

2 Lee, Roman-Dutch law, 143; Tambiah, Principles, 276.

3 Sande 1.1.88; Johan Van Den Sande, Treatise upon Restraints, 44-45.

the Prescription Ordinance of Sri Lanka does not contain any specific provision which provides for the avoidance of a void alienation. However, section 10 of the Ordinance is a residuary section; and it may be resorted to for the purpose. The section provides:

"No action shall be maintainable in respect of any cause of action not herein before expressly provided for, or expressly exempted from the operation of this Ordinance, unless the same shall be commenced within three years from the time when such cause of action shall have accrued".

The minor whose property is improperly alienated by the curator is therefore required to bring a vindicatory action¹ to avoid the alienation within three years from the date on which he attains majority. It has a strange similarity with the period of time required to avoid a voidable alienation in India, Pakistan and Bangladesh.

1 Cassaly v. Buhary (1956) 58 NLR 78.

C O N C L U S I O N

Minors' welfare is the hardcore of the law of guardianship; and for the achievement of this welfare developed states are very careful about their parental duty to the minors in proper cases as and when the state functionaries are approached. To cope with the changed social needs and circumstances, to protect the minors and their properties against economic inflation and decaying moral values new legislation is passed from time to time. But when one looks at the guardianship law of the Subcontinent one would be shocked to find antiquated laws obtaining there. It is not that society is not changing there; there is a lack of initiative, a disregard to minors' interests and selfish, unprogressive attitude on the part of the general public. Derrett observes¹:

"The law relating to guardianship is antiquated in shape, if not always in spirit. It is essentially conservative and restrictive. It is, like the Old India, very conscious of fraud, speculation, corruption. ... The sense of family is acute in India and Pakistan, and the love of children ubiquitous. But the Old India, with its caste, class, religious and other differences, has not got to grips with guardianship law, and this remains in need of urgent overhaul. As long as one is inspecting Hindu law, or Muslim law, this need is not so apparent. It is when one takes up the group of personal laws ... that one realises how antiquated the system is, and how ill adapted (as a whole) to the needs of a fast growing and developing nation".

1 Derrett, 'Minority in the Indian Subcontinent', in (1975) 35 L'Enfant, Recueils de la societe Jean Bodin, 395-457, 396.

In the Subcontinent the guardianship cases that come up are mostly regarding the alienation of properties of minors, involving primarily three factors, viz., first, the welfare of the minors by the preservation of their properties, secondly, the extent of the recognised and lawful authority of their guardians to alienate properties, and lastly, the protection of the interests of innocent purchasers of such properties. The correct balancing of these three factors is par excellence the function of the judges. The position of the latter is indeed very delicate. If they fail in their duties, injustice would be caused either to the minor or the alienee, rather than to the guardian, who deals with minor's property but seldom bears the effects of his dealing. In their endeavour to ascertain the balance the judges are guided either by the personal law of the minors or the statutory law as the situation demands. The law gives the guidelines and not the solution; it is the duty of the judges to mould the law justly to solve particular problems. But in so doing they must not be unjustly favourable to one party at the expense of the other. Unconscious bias, arising out of a priori notions regarding guardians, for example, must be exposed, or that balance may be prejudiced.

The guardianship Acts of the Subcontinent do contain provisions for the welfare of the minors but they do not contain any provision for safeguarding the interests of

alienees from guardians; that does not, however, indicate that only the interests of the minors should be protected and not those of the alienees. In the ultimate analysis, in the matter of alienation of minors' properties the interests of minors and alienees are so interdependent that one cannot thrive at the cost of the other. Therefore, in deciding cases involving alienations of minors' properties the judges should take into consideration the interests of both minors and alienees. In fact the consideration of these interests arises when the validity of a guardian's alienation is challenged by the minor on attaining majority. In Hindu law the validity of a guardian's alienation was determined by the application of the twin principles of Hunoomanpersaud's case¹ and this worked very well till the passing of the HMGA.

The HMGA requires the natural guardians to take the previous permission of the court for the alienation of a minor's separate immovable property²; and if they do not take any such permission, the alienation would be voidable requiring to be set aside at the instance of the minor or persons claiming under him. Section 11 of the Act is said to have abolished de facto guardianship, and therefore renders, as the courts are interpreting it³, all alienations

1 See supra, 87, 150, 182.

2 See supra, 244-245.

3 See supra, 332-334, 336.

effected by de facto guardians void. This has, what Derrett calls¹, "the unfortunate effect that even in the most deserving and proper cases of alienation, and even where the minor's needs are most pressing, no action will bind the minor unless the de facto guardian is first appointed by the court and the transaction is either specifically authorised or falls within the appropriate powers appertaining to this form of guardianship".

It may not be unlikely that Parliament was conscious about the dishonest practices of de facto guardians to make away with the minors' properties under the cover of minors' necessity or benefit, and this led them to insert section 11 to protect the property of the minors. But it cannot be denied that the needs and problems that once caused the growth of the institution of de facto guardianship are still there; for the last century and a quarter it has proved its utility to society. The present state of Hindu society and the pattern of judicial administration obtaining in the Subcontinent do not at all favour the abolition of de facto guardianship. The considerable inconvenience and expense in the appointment of guardians would not encourage well-meaning relatives or friends of a minor to seek appointment to deal with the minor's property as Parliament apparently expects. Therefore the interests of

1 Critique, 175 para 224.

minors would suffer most, since the would-be alienees would shut their doors to them. On the alleged abolition of de facto guardianship the equitable rule of Hunoomanpersaud's case, that a bona fide purchaser for value from a de facto guardian would not suffer for want of title in the guardian, cannot survive. Even in the case of natural guardians this principle has failed to survive under the HMGA. Since even the natural guardians are required to get the prior permission of the court for every major alienation of their minor children's property, the right of bona fide purchaser for value without notice would no longer remain as such if the alienation was effected without such permission. This would also affect the interests of the minors.

In this state of affairs it was not wise to read the section as abolishing de facto guardianship. It is seen from the observation of different commentators of the section¹ that the usefulness of de facto guardianship is felt in everyday life. The de facto guardians should be allowed to enjoy the same powers as they used to do under Anglo- Hindu law. But as long as section 11 in its present form is there, the over-enthusiastic judges would interpret it as having abolished de facto guardianship. Therefore section 11 of the HMGA needs urgently to be amended to enable (i) de facto guardians to have powers similar to

¹ See supra, 322-332.

those of natural guardians as far as they are conformable to the requirements of de facto guardianship as under Anglo-Hindu law; and (ii) alienees from de facto and natural guardians to take advantage of the equitable rule in Hunoomanpersaud's case.

When section 11 of the HMGA has been amended in accordance with the suggestions made above, the Anglo-Hindu law view about the improper alienation of a de facto guardian and the difference that was maintained in this respect between the improper alienation of a de jure guardian and that of a de facto guardian would be required to be removed. It is seen that following the Privy Council decisions in Muslim cases, where the idea about alienating authority of a de facto guardian is quite contrary to Hindu law, the courts were holding the improper alienations of Hindu de facto guardians as void, although the Hindu de facto guardians are not 'unauthorised persons' like Muslim de facto guardians. The difference between the improper alienation of a legal guardian and that of a de facto guardian was purely artificial and had no connection with the actual state of affairs. Both kinds of improper alienations should be treated as voidable, and not the one void and the other voidable, and a suit must be filed for avoiding each of them.

Completely new as compared with the Limitation Act of 1908, Article 60(b) [India] Limitation Act of 1963

provides that the legal representatives of a minor may sue to set aside the transfer made by the guardian within three years of the ward's attaining majority where the ward dies within those three years, and where the ward dies before attaining majority within three years from the date of the ward's death. Under the personal law this applies only when a guardian's alienation is voidable and the suit is to set aside that alienation¹. If a de facto guardian's improper alienation is considered voidable it would fit squarely with the provisions of the above Article of the Limitation Act. Moreover the provisions of the Article agree fairly with provisions of section 8(3) of the HMGA. Indeed when the improper alienations of de facto guardians are regarded as voidable there would be a harmony between the personal and the limitation law, and a desirable uniformity between the incidents of natural and de facto guardianship in Hindu law. It will also add some security to the lives of minors; no more wicked uncles would be benefited by tipping the minors down wells, since the persons claiming under them (minors) may include the transferees from them² and they may avoid the guardians' improper alienations. This needs only a Supreme Court ruling. The Indian Supreme Court is expected to give a decision in the light of discussion made in this thesis.

1 Derrett, Critique, 191, para 243.

2 Amirtham Kudumban v. Sornam Kudumban (1977) 1 MLJ 1 (FB).

Again, section 8(2) of the HMGA requiring a guardian to obtain the prior permission of the court for the alienation of a minor's property presents a problem in the case of a joint family consisting of the minor and his mother, if the minor's interest in the joint family property is required to be transferred. The mother cannot sell the minor's interest as she is not the manager and she cannot be such as she is not a coparcener; nor can she sell as the natural guardian because the court, other than the Original side of some High Courts, having no jurisdiction over the undivided interests of a minor under section 6 of the HMGA, cannot give her permission for sale¹. In such a case either the court should be given jurisdiction over the undivided interest of the minor in joint family property by amending the section 6, or the mother should be considered a manager to be able to alienate the minor's interest in the joint family property. Of the two solutions the latter is more welcome, since it can be achieved by a Supreme Court ruling overruling its obiter dictum in Commissioner of I.T. v. Seth Govindram Sugar Mills². The decision of the said Supreme Court should therefore be overruled.

In Muslim law the mother is not considered as the natural guardian of her minor children; she may be entrusted

1 See supra, 248-249.

2 AIR 1966 SC 24.

with the person of her minor children but not with their property because according to Muslim authorities she being a woman cannot exercise 'discretion' properly¹. Such a notion about women should hardly be a matter of law in this day and age. In the modern world given equal opportunities they could prove equal to men. In the present developed society with its nuclear families the mother should be considered as the natural guardian of her minor children with power to deal with the minors' movable and immovable properties. She should be given full powers of a father; and her guardianship should be recognised next after the father. The authority of a de facto guardian to alienate the property of a minor is also not yet recognised in Muslim law even in the case of extreme necessity or benefit of the minor. This situation resulted from the Privy Council ruling in Imambandi v. Mutsaddi²; but prior to this ruling a de facto guardian's authority to deal with a minor's property was not altogether denied; in cases of extreme necessity and for the benefit of the minor it was allowed³. Unusually identifying Muslim fuzuli contract with law of agency their Lordships came to their finding, while fuzuli contract is a Muslim counterpart of Roman negotiorum gestio and under it a stranger can act for the benefit of another. The Muslim authorities which were mainly relied on in that case do not say anything directly against de facto guardianship;

1 See supra, 413.

2 (1918) 23 CWN 50 (PC).

3 See supra, 396-400.

it was the assumption of their Lordships from those authorities merely. The grounds which inspired the growth of de facto guardianship among the Hindus are also there in the case of the Muslims. In the absence of any direct authority in support of the Privy Council decision and there being constant cases for the denial of power to de facto guardians, the said Privy Council decision should be reconsidered in the light of present needs and circumstances. Therefore Muslim mothers should be given the status of natural guardians with power to deal with their minor children's property and also de facto guardians' authority to deal with the minors' properties should be recognised. Supreme Courts of India, Pakistan and Bangladesh should give rulings in this direction in proper cases.

The courts of India, Pakistan and Bangladesh should understand the ruling of Mir Sarwarjan v. Fakhruddin Mahomed¹ in the light of the discussion made in this thesis. They should no more hold that it is not within the competence of the guardian of a minor to bind the minor's estate by a contract for the purchase of immovable property. Through the wrong understanding of the decision in the above Privy Council case the courts of the Subcontinent have developed the precedent that a minor's guardian has no authority to bind the minor's estate by a contract for the purchase of

¹ (1911) 39 IA 1 (PC).

lands, and that no contract can be specifically enforced against the minor's estate. If a guardian is otherwise competent and if it is beneficial to the minor, he can, in my submission, enter into a contract for the purchase of lands and such contract may be specifically enforced against the minor's property. There is hardly any necessity to distinguish this case as a Muslim case. What the Privy Council said in that case about the existence of mutuality in a guardian's contract was not properly understood by the courts. The Supreme Courts of India, Pakistan and Bangladesh should give rulings in the light of the suggestions made here.

In the appointment of guardians the courts of different countries should be careful not to appoint the same person as the guardian of a minor's person and of his property if that person is a prospective heir to the minor's property. Here a useful provision of Islamic law can be adopted with advantage for all communities. The legislatures may review the age of majority to bring it down to eighteen years of age in all cases.

In Sri Lanka under the general law a natural guardian of a minor cannot deal with the minor's property unless he is appointed a curator by the court, and if he acts without appointment his act would be ipso jure void. But if a stranger acts as a negotiorum gestor for a third party, his act may be upheld if it is done in good faith and for

the benefit or advantage of the third party¹. The Supreme Court of Sri Lanka may consider if the institution of negotiorum gestio could be introduced in the case of a guardian's dealings with his minor ward's property

It is hoped that the problems which arise in the family laws of South Asian countries, which are highlighted in this thesis, would attract the attention of the concerned countries and they may try to solve them, in the light of the suggestions made here, either by legislation or by judicial development of the relevant laws as appropriate.

1 Atukorale v. Atukorale (1971) 71 NLR 369, 374.

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